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Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

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II. Equal Credit Opportunity

A. In General

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West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

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Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

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§ 147. Generally

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West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

As to the Equal Credit Opportunity Act, generally, see Am. Jur. Legal Forms 2d—Consumer Credit Protection Acts [Westlaw® Search Query]

Forms relating to extension of consumer credit; credit applications, generally, see Am. Jur. Legal Forms 2d—Consumer Credit Protection Acts [Westlaw® Search Query]

The Equal Credit Opportunity Act (ECOA) prohibits discrimination against applicants for credit on the basis of race, color, religion, national origin, sex, marital status, or age and the like.[1]

Observation:

The ECOA applies to both the Truth in Lending Act and the Consumer Leasing Act.[2]

The ECOA applies to commercial loans as well as personal loans.[3]

The ECOA provides that each creditor must furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than three days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.[4] The applicant may waive the three day requirement except where otherwise required in law.[5] The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal except where otherwise required in law.[6] However, the creditor must provide a copy of each written appraisal or valuation at no additional cost to the applicant.[7] At the time of application, the creditor must notify an applicant in writing of the right to receive a copy of each written appraisal and valuation.[8]

The ECOA defines the key terms used therein.[9]

Footnotes

1 15 U.S.C.A. § 1691(a).
As to discrimination against applicant for credit, see §§ 149 to 159.

2 Brothers v. First Leasing, 724 F.2d 789 (9th Cir. 1984).
The Truth in Lending Act, 15 U.S.C.A. §§ 1601 et seq., is discussed in §§ 1 to 146.
The Consumer Leasing Act, 15 U.S.C.A. §§ 1667 et seq., is discussed in §§ 100 to 107.

3 Bagley v. Lumbermens Mut. Cas. Co., 100 F. Supp. 2d 879 (N.D. Ill. 2000).

4 15 U.S.C.A. § 1691(e)(1).

5 15 U.S.C.A. § 1691(e)(2).

6 15 U.S.C.A. § 1691(e)(3).

7 15 U.S.C.A. § 1691(e)(4).

8 15 U.S.C.A. § 1691(e)(5).

9 15 U.S.C.A. § 1691a.

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A. In General

§ 148. Regulations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

Forms relating to good faith reliance of rule or regulation, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The Bureau of Consumer Financial Protection is required to prescribe regulations to carry out the purposes of the Equal Credit Opportunity Act (ECOA).[1] The regulations may exempt from the provisions of the ECOA any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Bureau determines, after making an express finding that the application of the ECOA or of any provision of the ECOA of such transaction would not contribute substantially to effecting the purposes of the ECOA.[2] Pursuant to Bureau regulations, entities making business or commercial loans must maintain such records or other data relating to such loans as may be necessary to evidence compliance with this subsection or enforce any action pursuant to the authority of the ECOA.[3] The Bureau must provide in regulations that an applicant for a business or commercial loan must be provided a written notice of the applicant's right to receive a written statement of the reasons for the denial of the loan.[4]

The Bureau has promulgated an implementing regulation to the statute set out above.[5]

Footnotes

1 15 U.S.C.A. § 1691b(a).
However, the Board of Governors of the Federal Reserve System must prescribe regulations to carry out the purposes of the ECOA with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 15 U.S.C.A. § 1691b(f).

2 15 U.S.C.A. § 1691b(b).
An exemption granted according to this provision may not be for longer than five years and may be extended only if the Bureau makes a subsequent determination that the exemption remains appropriate. 15 U.S.C.A. § 1691b(c).

3 15 U.S.C.A. § 1691b(d).

4 15 U.S.C.A. § 1691b(e).

5 12 C.F.R. §§ 1002.1 et seq.
Regulations of the Board applicable to motor vehicle dealers that predominantly engage in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both are found in 12 C.F.R. §§ 202.1 et seq.
As to particular regulations, see §§ 147 to 168.

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Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 50, 51, 57

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B. Discrimination Against Applicant for Credit

§ 149. Prohibited discrimination, in general

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

Forms relating to extension of consumer credit; credit applications, generally, see Am. Jur. Legal Forms 2d—Consumer Credit Protection Acts [Westlaw® Search Query]

Forms relating to good faith reliance of rule or regulation, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Under the Equal Credit Opportunity Act (ECOA), it is unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).[1] Furthermore, it is unlawful to discriminate because all or part of the applicant's income derives from any public assistance program[2] or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[3]

Practice Tip:

The implementing regulations define the term "discriminate against an applicant" as meaning to treat an applicant less favorably than other applicants.[4]

The implementing regulations render certain regulatory provisions inapplicable to several types of credit transactions.[5]

Footnotes

1 15 U.S.C.A. § 1691(a)(1).
"Applicant" is defined at 15 U.S.C.A. § 1691a(b).

2 15 U.S.C.A. § 1691(a)(2).

3 15 U.S.C.A. § 1691(a)(3).
As to the Consumer Credit Protection Act, generally, see § 1.

4 12 C.F.R. §§ 202.2(n), 1002.2(n).

5 12 C.F.R. §§ 202.3, 1002.3.

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B. Discrimination Against Applicant for Credit

§ 150. National origin

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against any applicant, with respect to any aspect of a credit transaction, on the basis of, inter alia, national origin.[1] However, neither this provision nor its legislative history shows any intent on the part of Congress to proscribe denial of credit on the ground of lack of citizenship.[2] Moreover, implementing regulations specifically provide that a creditor may take immigration status into account in evaluating credit applications.[3]

Footnotes

1 15 U.S.C.A. § 1691(a)(1).

2 Nguyen v. Montgomery Ward & Co., Inc., 513 F. Supp. 1039 (N.D. Tex. 1981).

3 12 C.F.R. §§ 202.6(b)(7), 1002.6(b)(7).

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B. Discrimination Against Applicant for Credit

§ 151. Race

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

It is unlawful for any creditor to discriminate against any applicant, under the Equal Credit Opportunity Act (ECOA), with respect to any aspect of a credit transaction on the basis of, inter alia, race.[1] Targeting racial minorities for higher cost loans sets out a discrimination-based theory of recovery under the ECOA.[2]

CUMULATIVE SUPPLEMENT

Cases:

Operators of livestock farm who had been denied federal farm operating loan, allegedly because of their race, in violation of Equal Credit Opportunity Act (ECOA), were not likely to suffer irreparable harm in the absence of an injunction enjoining foreclosure of their property, as required for injunctive relief to issue; operators of farm did not face an immediate sale of their property, nor was a sale scheduled to occur at a certain date or time, and even if court ruled against them, operators would have a right to appeal that decision, which provided them with an adequate legal remedy in the absence of injunctive relief. Consumer Credit Protection Act § 701, 15 U.S.C.A. § 1691. Wise v. United States, 128 F. Supp. 3d 311 (D.D.C. 2015).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1691(a)(1).

2 Martinez v. Freedom Mortg. Team, Inc., 527 F. Supp. 2d 827 (N.D. Ill. 2007).

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§ 152. Sex

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against any applicant, with respect to any aspect of a credit transaction, on the basis of, inter alia, sex.[1] The sex-discrimination prohibition of the ECOA protects men as well as women although the prohibited bases of discrimination under the ECOA do not include style of dress or sexual orientation.[2]

Statistical evidence that women and minorities were under-represented in the population of homeowners in the city did not show that the city's policy authorizing direct billing of a tenant for water services only if the landlord agreed in writing and any existing balance on the account was immediately paid had a disparate impact on female and minority applicants for water service, in violation of the ECOA; the evidence did not indicate whether the proportion of women and minorities in the actual applicant pool was larger, in a statistically significant sense, than the proportion of women and minorities in the group of successful applicants.[3]

Footnotes

1 15 U.S.C.A. § 1691(a)(1).

2 Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

3 Golden v. City of Columbus, 404 F.3d 950, 2005 FED App. 0179P (6th Cir. 2005).

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B. Discrimination Against Applicant for Credit

§ 153. Marital status

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

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Discrimination against credit applicant on basis of marital status under Equal Credit Opportunity Act (15 U.S.C.A. secs. 1691 et seq.), 55 A.L.R. Fed. 458

Forms

Forms relating to spouse, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

It is unlawful, under the Equal Credit Opportunity Act (ECOA), for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of marital status.[1] The purpose of the ECOA is to eradicate credit discrimination against women, especially married women whom creditors traditionally refused to consider for individual credit.[2]

Observation:

The ECOA also protects against the discrimination that would prefer single persons over married people. Thus, the ECOA was violated by a company's credit program designed to meet the credit needs of people 18 to 21 years old where the result was that white, single females received better credit terms under the program than, inter alia, married persons.[3]

The section of the ECOA prohibiting any creditor from discriminating against a loan applicant on the basis of sex or marital status was initially designed, at least in part, to curtail the practice among creditors of refusing to grant a wife's credit application without a guaranty from her husband.[4] However, a creditor can require a guarantor's wife to join in the husband's guaranty, without discriminating based on marital status contrary to the ECOA, if the creditor determines that the husband is not independently creditworthy.[5] Likewise, a lender did not discriminate against a guarantor's wife on the basis of her marital status by requiring her to join as a guarantor in a loan to her husband's business as the lender insisted that the wife join in guaranteeing only after it discovered that many of the assets listed on the husband's personal financial statement were jointly owned by the husband and the wife and that the husband was not independently creditworthy for the amount of the requested loan.[6] Similarly, requiring a franchisee owner's spouse to guaranty debts to the franchisor was not discrimination on the basis of marital status and, therefore, did not violate the EEOA where the owner's list of assets showed several residences, and the franchisor naturally and correctly assumed that the spouse had an interest in those assets.[7]

Footnotes

1 15 U.S.C.A. § 1691(a)(1).
The term "marital status" means the state of being unmarried, married, or separated as defined by applicable state law; the term "unmarried" includes persons who are single, divorced, or widowed. 12 C.F.R. §§ 202.2(u), 1002.2(u).
As to permissible inquiries of marital status, see § 156.

2 Ballard v. Bank of America, N.A., 734 F.3d 308 (4th Cir. 2013); Midkiff v. Adams County Regional Water District, 409 F.3d 758, 2005 FED App. 0226P (6th Cir. 2005).

3 U.S. v. American Future Systems, Inc., 743 F.2d 169 (3d Cir. 1984).

4 Mayes v. Chrysler Credit Corp., 37 F.3d 9 (1st Cir. 1994).

5 Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F.3d 28 (3d Cir. 1995).

6 Riggs Nat. Bank of Washington, D.C. v. Linch, 36 F.3d 370 (4th Cir. 1994).

7 Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC, 476 F.3d 436 (7th Cir. 2007).

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B. Discrimination Against Applicant for Credit

§ 154. Marital status—Requiring spouse to cosign

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

Forms relating to spouse, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The regulations prohibit a creditor from requiring the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards for creditworthiness for the amount and terms of the credit requested.[1] In this connection, neither the Equal Credit Opportunity Act (ECOA) nor this provision of the regulations prohibits a creditor from requiring the signature of one who applies jointly with another for credit even though the joint application is made by husband and wife since the prohibition against requiring the signature of the applicant's spouse is specifically inapplicable to joint applicants.[2] However, a creditor violated the statute and regulation where the creditor eventually granted a loan solely on the basis of the applicant's willingness and ability to pay but had required the signature of the applicant's spouse, and the clear violation constituted discrimination under the statute and the regulation.[3]

A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, does not constitute discrimination under the ECOA provided, however, that

this provision cannot be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.[4]

Footnotes

1 12 C.F.R. §§ 202.7(d)(1), 1002.7(d)(1).

2 Cragin v. First Federal Sav. and Loan Ass'n, 498 F. Supp. 379 (D. Nev. 1980).

3 Anderson v. United Finance Co., 666 F.2d 1274 (9th Cir. 1982).

4 15 U.S.C.A. § 1691d(a).

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§ 155. Marital status—Change in status

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

Forms relating to spouse, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

In the absence of evidence of the applicant's inability or unwillingness to repay, a creditor may not require a reapplication, change the terms of the account, or terminate the account regarding an applicant who is contractually liable on an existing open-end account on the basis of a change in the applicant's marital status.[1] However, a creditor may require a reapplication for an open-end account on the basis of a change in the marital status of an applicant who is contractually liable if the credit granted was based in whole or in part on income of the applicant's spouse and if information available to the creditor indicates that the applicant's income may not support the amount of credit currently available.[2]

Footnotes

1 12 C.F.R. §§ 202.7(c)(1), 1002.7(c)(1).

2 12 C.F.R. §§ 202.7(c)(2), 1002.7(c)(2).

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§ 156. Permissible inquiries

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

Forms

Forms relating to improper inquiry, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

It does not constitute discrimination for a creditor to make an inquiry of marital status if it is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of creditworthiness.[1] An inquiry may be made as to the applicant's age or whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of creditworthiness as provided in the regulations.[2] It is not discriminatory to inquire as to or consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of the applicant.[3] It is also not discriminatory to make an inquiry under the statute providing for small business loan data collection,[4] which provides that in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution must inquire whether the business is a women-owned, minority-owned, or small business without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means and whether or not such application is in response to a

solicitation by the financial institution,[5] and maintain a record of the responses to such inquiry separate from the application and accompanying information.[6] Further, it is not discriminatory to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations, except that in the operation of such system, the age of an elderly applicant may not be assigned a negative factor or value.[7]

The Equal Credit Opportunity Act provides that consideration or application of state property laws directly or indirectly affecting creditworthiness does not constitute discrimination for purposes of the Act.[8]

Footnotes

1 15 U.S.C.A. § 1691(b)(1).

2 15 U.S.C.A. § 1691(b)(2).

3 15 U.S.C.A. § 1691(b)(4).

4 15 U.S.C.A. § 1691(b)(5).

5 15 U.S.C.A. § 1691c-2(b)(1).

6 15 U.S.C.A. § 1691c-2(b)(2).

7 15 U.S.C.A. § 1691(b)(3).
The implementing regulations define the term "empirically derived credit system." 12 C.F.R. §§ 202.2(p), 1002.2(p).

8 15 U.S.C.A. § 1691d(b).

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§ 157. When credit may be refused

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31

The Equal Credit Opportunity Act (ECOA) provides that it is not a violation of the Act for a creditor to refuse to extend credit offered pursuant to certain, credit assistance programs if such refusal is required by, or made pursuant to, such program.[1] These programs are enumerated as any credit assistance program expressly authorized by law for an economically disadvantaged class of persons,[2] any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons[3] or any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations.[4] The implementing regulations provide rules for the application of the above statutory provisions.[5]

Footnotes

1 15 U.S.C.A. § 1691(c).
2 15 U.S.C.A. § 1691(c)(1).
3 15 U.S.C.A. § 1691(c)(2).
4 15 U.S.C.A. § 1691(c)(3).
5 12 C.F.R. §§ 202.8, 1002.8.

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§ 158. Notification of action on application; reasons for adverse action

Topic Summary | Correlation Table | References

West's Key Number Digest

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Notification of Adverse Action on, Incompleteness of, or Counteroffer to, Credit Application Under Equal Credit Opportunity Act (15 U.S.C.A. ss1691 et seq.) and Regulation B Promulgated Thereunder (12 C.F.R. Part 202), 34 A.L.R. Fed. 2d 311

Trial Strategy

Lender Liability for Negligent Misrepresentation Made to Business Loan Applicant, 19 Am. Jur. Proof of Facts 3d 477
Credit, 3 Am. Jur. Proof of Facts 453

Forms

Forms relating to issuer's denial of credit, generally, see Am. Jur. Legal Forms 2d—Credit Cards [Westlaw® Search Query]

Forms relating to failure to make required disclosures, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Am. Jur. Pleading and Practice Forms—Credit Cards; Federal Procedural Forms (L.Ed.) —Consumer Credit Protection [Westlaw® Search Query]

Under the Equal Credit Opportunity Act (ECOA), a creditor must notify the applicant of its action on the application within 30 days (or such longer reasonable time as specified in regulations) after receipt of a completed application for credit.[1] Where adverse action[2] is taken, the applicant is entitled to a statement of reasons for such action from the creditor.[3] A creditor satisfies this obligation by: (1) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or (2) giving written notice of adverse action which discloses the applicant's right to a statement within 30 days after receipt by the creditor of a request made within 60 days after such notification and the identity of the person or office from which such statement may be obtained.[4] A statement of reasons meets the requirements of the ECOA only if it contains the specific reasons for the adverse action taken.[5]

An application is not "complete" within the meaning of the ECOA until the creditor has received all the information that it regularly obtains and considers in evaluating applications.[6] Indeed, an application is not complete until the lender receives, through its exercise of reasonable diligence, the last piece of information regularly obtained in the loan application process.[7] Accordingly, loan applicants were not entitled to notice within 30 days after they submitted an application in that the application was not considered "complete" within the meaning of the ECOA until the creditor had obtained verifying information and whatever other types of reports or information it ordinarily required to evaluate a loan.[8] In the absence of bad faith, a reasonably diligent review of a challenged appraisal is a normal and reasonable part of the proper consideration of a loan application that restarts the period, under the ECOA, within which a creditor must notify the loan applicant of its action on the completed application.[9]

The statement of reason for an adverse action may be given orally if the written notification advises the applicant of his or her right to have the statement of reasons confirmed in writing on written request.[10] Further, the statutory requirements as to statement of reasons may be satisfied by verbal statements or notifications in the case of a creditor who did not act on more than 150 applications during the preceding calendar year as determined under regulations.[11]

The ECOA's notice provisions apply to all loan applicants, not only those who claim to have been denied credit due to discrimination.[12]

Footnotes

1 15 U.S.C.A. § 1691(d)(1).
As to times for notification prescribed by regulation, see 12 C.F.R. §§ 202.9(a)(1), 1002.9(a)(1).

2 As to what constitutes "adverse action," see § 159.

3 15 U.S.C.A. § 1691(d)(2).

4 15 U.S.C.A. § 1691(d)(2).

5 15 U.S.C.A. § 1691(d)(3).
Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by the Act may be made directly

by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed. 15 U.S.C.A. § 1691(d)(4).

6 Riggs Nat. Bank of Washington, D.C. v. Webster, 832 F. Supp. 147 (D. Md. 1993).

7 Dufay v. Bank of America N.T. & S.A. of Oregon, 94 F.3d 561 (9th Cir. 1996).

8 High v. McLean Financial Corp., 659 F. Supp. 1561 (D.D.C. 1987); Kirk v. Kelley Buick of Atlanta, Inc., 336 F. Supp. 2d 1327 (N.D. Ga. 2004).

9 Dufay v. Bank of America N.T. & S.A. of Oregon, 94 F.3d 561 (9th Cir. 1996).

10 15 U.S.C.A. § 1691(d)(2).

11 15 U.S.C.A. § 1691(d)(5).

12 Williams v. MBNA America Bank, N.A., 538 F. Supp. 2d 1015 (E.D. Mich. 2008).

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17 Am. Jur. 2d Consumer Protection § 159

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II. Equal Credit Opportunity

B. Discrimination Against Applicant for Credit

§ 159. Notification of action on application; reasons for adverse action—What constitutes "adverse action"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 50

A.L.R. Library

Notification of Adverse Action on, Incompleteness of, or Counteroffer to, Credit Application Under Equal Credit Opportunity Act (15 U.S.C.A. ss1691 et seq.) and Regulation B Promulgated Thereunder (12 C.F.R. Part 202), 34 A.L.R. Fed. 2d 311

Trial Strategy

Credit, 3 Am. Jur. Proof of Facts 453

Forms

Forms relating to issuer's denial of credit, generally, see Am. Jur. Legal Forms 2d—Credit Cards [Westlaw® Search Query]

Forms relating to failure to make required disclosures, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Am. Jur. Pleading and Practice Forms—Credit Cards; Federal Procedural Forms (L.Ed.) —Consumer Credit Protection [Westlaw® Search Query]

The term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. The term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default or where such additional credit would exceed a previously established credit limit.[1] The regulations expand on this definition and provide that an adverse action includes a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered.[2]

An adverse action does not include a change in the terms of an account expressly agreed to by an applicant,[3] but this provision does not apply in an application for a loan because such an application is not an extension of credit and does not involve the establishment of an account.[4] A lender's unilateral increase in interest rates payable by various borrowers was not an "adverse action" requiring ECOA notice where the increase affected all matured mortgage loans in the same class.[5] A mortgage broker's alleged interference with the mortgagors' loan application does not constitute an "adverse action" subject to the ECOA's procedural notification requirements.[6]

A car dealership's unilateral decision not to submit a prospective car buyer's credit application to any lender constitutes an "adverse action" for purposes of the ECOA.[7]

Footnotes

1 15 U.S.C.A. § 1691(d)(6).

2 12 C.F.R. §§ 202.2(c)(1)(i), 1002.2(c)(1)(i).

3 12 C.F.R. §§ 202.2(c)(2)(i), 1002.2(c)(2)(i).

4 Jochum v. Pico Credit Corp. of Westbank, Inc., 730 F.2d 1041 (5th Cir. 1984).

5 Sutliff v. County Sav. and Loan Co., 533 F. Supp. 1307 (N.D. Ohio 1982).

6 Kivel v. WealthSpring Mortg. Corp., 398 F. Supp. 2d 1049 (D. Minn. 2005).

7 Treadway v. Gateway Chevrolet Oldsmobile Inc., 362 F.3d 971, 34 A.L.R. Fed. 2d 761 (7th Cir. 2004).

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17 Am. Jur. 2d Consumer Protection One II C Refs.

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Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 60 to 67

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A.L.R. Index, Equal Credit Opportunity Act

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1. Administrative Enforcement

§ 160. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 60

Treatises and Practice Aids

As to administrative enforcement, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements of the Equal Credit Opportunity Act (ECOA) is enforced by governmental officers and agencies specifically enumerated in the Act pursuant to the federal statutes under which they act.[1] For the purpose of the exercise of such power by such federal officers or agencies, a violation of any requirement imposed under the ECOA is deemed to be a violation of a requirement imposed under the federal statutes under which they act and, in addition, such officers or agencies may exercise any other authority conferred by law.[2]

Footnotes

1 15 U.S.C.A. § 1691c(a).

2 15 U.S.C.A. § 1691c(b).

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17 Am. Jur. 2d Consumer Protection § 161

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§ 161. Federal Trade Commission

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 60

Treatises and Practice Aids

As to administrative enforcement, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Except to the extent that enforcement of the Equal Credit Opportunity Act (ECOA) is specifically committed to other governmental officers or agencies and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission (FTC) enforces the requirements of the ECOA.[1] For the purpose of the exercise by the FTC of its functions and powers under the Federal Trade Commission Act,[2] a violation of any requirement imposed under the ECOA is deemed a violation of a requirement imposed under the Federal Trade Commission Act.[3] All of the functions and powers of the FTC under the Federal Trade Commission Act are available to it to enforce compliance with the requirements imposed by the ECOA, including regulations promulgated thereunder, irrespective of whether a person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce any rule prescribed by the Bureau under the ECOA in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.[4]

Footnotes

1 15 U.S.C.A. § 1691c(c).
As to administrative enforcement of ECOA by other governmental officers and agencies, see § 160.

2 15 U.S.C.A. §§ 41 et seq.
As to the Federal Trade Commission Act, generally, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1104 to 1231.

3 15 U.S.C.A. § 1691c(c).

4 15 U.S.C.A. § 1691c(c).
As to the functions, jurisdiction, and powers of the Federal Trade Commission, generally, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1168 to 1172.

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2. Civil Liability

§ 162. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 61.1, 63

Treatises and Practice Aids

As to private actions, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Lender Liability for Negligent Misrepresentation Made to Business Loan Applicant, 19 Am. Jur. Proof of Facts 3d 477

Forms

Forms relating to denial of credit because of marital status, see Am. Jur. Pleading and Practice Forms—Civil Rights [Westlaw® Search Query]

Forms relating to equal credit opportunity, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection [Westlaw® Search Query]
Forms relating to equal credit opportunity proceedings, generally, see Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor who fails to comply with any requirement imposed by the Equal Credit Opportunity Act (ECOA) is liable to the aggrieved applicant for credit for any actual damages sustained by the applicant acting either in an individual capacity or as a member of a class.[1]

Violations of ECOA regulations may be actionable.[2]

To establish a prima facie case under the ECOA, a plaintiff must show that he or she: (1) was a member of a protected class; (2) applied for credit from the defendant; (3) was qualified for credit; and (4) despite qualification, was denied credit.[3] However, a denial of credit is not a prerequisite to every ECOA theory of recovery.[4] In addition, a procedural violation of the notice provisions of ECOA may provide the basis for a cause of action even without regard to allegations of discrimination.[5] To establish liability under the procedural notification requirements of the ECOA, a consumer must show that the creditor took adverse action against his or her credit application and failed to provide him or her with written notification of the reasons for the adverse action. Being a member of a protected class is not a prerequisite to bringing a claim based upon the creditor's violation of the ECOA's procedural notification requirements.[6]

A credit applicant may prove unlawful discrimination under the ECOA using one or more of three theories: (1) direct evidence of discrimination; (2) disparate impact analysis; and (3) disparate treatment analysis.[7]

CUMULATIVE SUPPLEMENT

Cases:

Car dealership was a creditor subject to Equal Credit Opportunity Act's (ECOA) notice requirement, and thus dealership was required to give written notice to prospective car buyer when it changed terms of buyer's credit arrangement, although financing deals prepared by dealership were generally assigned to a lender, where lender's only role in transaction was to determine whether it would pay dealership an advance on financing agreement, terms of which were set buy dealership, and dealership made decision, after being told by lender that original terms would not be approved for funding, to change buyer's original terms. Consumer Credit Protection Act § 701(d)(2), (6), 15 U.S.C.A. § 1691(d)(2), (6); 12 C.F.R. § 1002.1(a). Tyson v. Sterling Rental, Inc., 836 F.3d 571 (6th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1691e(a).

2 Thiel v. Veneman, 859 F. Supp. 2d 1182 (D. Mont. 2012).

3 Chiang v. Veneman, 46 V.I. 679, 385 F.3d 256 (3d Cir. 2004); Haug v. PNC Financial Services Group, Inc., 930 F. Supp. 2d 871 (N.D. Ohio 2013).

4 Martinez v. Freedom Mortg. Team, Inc., 527 F. Supp. 2d 827 (N.D. Ill. 2007); JAT, Inc. v. National City Bank of Midwest, 460 F. Supp. 2d 812 (E.D. Mich. 2006).

5 Errico v. Pacific Capital Bank, N.A., 753 F. Supp. 2d 1034 (N.D. Cal. 2010).

6 Kivel v. WealthSpring Mortg. Corp., 398 F. Supp. 2d 1049 (D. Minn. 2005).

7 Shiplet v. Veneman, 620 F. Supp. 2d 1203 (D. Mont. 2009), aff'd, 383 Fed. Appx. 667 (9th Cir. 2010).

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2. Civil Liability

§ 163. Compensatory and punitive damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 61.1

Treatises and Practice Aids

As to damages, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Forms

Forms relating to motions to dismiss class action, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

A creditor, other than a government or governmental subdivision or agency, is liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000 for failure to comply with the requirements of the Equal Credit Opportunity Act (ECOA), in addition to actual damages.[1] In a class action, the total recovery for punitive damages may not exceed the lesser

of $500,000 or 1% of the net worth of the creditor.[2] In determining the amount of such damages in any action, the court must consider, among other relevant factors:[3]

• the amount of any actual damages awarded

• the frequency and persistence of failures of compliance by the creditor

• the resources of the creditor

• the number of persons adversely affected

• the extent to which the creditor's failure of compliance was intentional

Footnotes

1 15 U.S.C.A. § 1691e(b).

2 15 U.S.C.A. § 1691e(b).

3 15 U.S.C.A. § 1691e(b).

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2. Civil Liability

§ 164. Equitable and declaratory relief

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 61.1, 67

Treatises and Practice Aids

As to equitable and declaratory relief, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

A court of competent jurisdiction may grant equitable and declaratory relief necessary to enforce the requirements imposed by the Equal Credit Opportunity Act (ECOA) upon the application of an aggrieved applicant.[1]

Footnotes

1 15 U.S.C.A. § 1691e(c).

17 Am. Jur. 2d Consumer Protection § 165

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2. Civil Liability

§ 165. Costs and attorney's fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 61.1, 67

Treatises and Practice Aids

As to costs; attorney's fees, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Where an action to recover actual or punitive damages, or for equitable and declaratory relief, is successful, the costs of the action, together with a reasonable attorney's fee as determined by the court, are to be added to the damages awarded by the court.[1] Thus, plaintiffs who cause a creditor to halt an illegal practice should be compensated for their attorney's fees, and in considering the size of attorney's fees to be awarded under this provision, the court should consider all relevant factors on a case-by-case basis, including the amount of damages awarded, the number of past and future consumers affected by the creditor's discrimination, the complexity of the litigation, and the time expended.[2]

CUMULATIVE SUPPLEMENT

Cases:

Fees of $3,802.00 billed by attorneys for prevailing party in Equal Credit Opportunity Act (ECOA) action, for clerical tasks such as inspecting case files, mailing correspondence, and receiving court reporter invoices, were part of attorneys' overhead and had to be deducted from fees awarded under fee-shifting provision of the ECOA, notwithstanding attorneys' contention that small size of their firm necessitated that such tasks be performed by attorneys. Consumer Credit Protection Act § 706(d), 15 U.S.C.A. § 1691e(d). Pigford v. Vilsack, 89 F. Supp. 3d 25 (D.D.C. 2015).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1691e(d).

2 Anderson v. United Finance Co., 666 F.2d 1274 (9th Cir. 1982).

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II. Equal Credit Opportunity

C. Enforcement and Liability

2. Civil Liability

§ 166. Prohibition against double recovery

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 61.1

Treatises and Practice Aids

As to damages, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

A person aggrieved by a violation of the Equal Credit Opportunity Act (ECOA) and by a violation of the fair housing enforcement provisions[1] may not recover under both if the violation is based on the same transaction.[2]

Practice Tip:

This provision does not preclude a plaintiff from pursuing claims under both statutes, but instead only precludes recovery under both statutes.[3]

Where the same act or omission constitutes a violation of the ECOA and of applicable state law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under the ECOA or under the state law but not both. This election of remedies does not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.[4]

Footnotes

1 42 U.S.C.A. §§ 3605, 3612.

2 15 U.S.C.A. § 1691e(i).

3 National Ass'n for Advancement of Colored People v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096 (C.D. Cal. 2009), as amended, (Jan. 13, 2009).

4 15 U.S.C.A. § 1691d(e).

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2. Civil Liability

§ 167. Good-faith compliance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 62

Provisions of the Equal Credit Opportunity Act imposing liability do not apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau of Consumer Financial Protection or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the bureau to issue such interpretations or approvals under prescribed procedures, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[1] Substantial compliance with the guidelines provided in this provision fulfills the requirements thereof.[2]

Footnotes

1 15 U.S.C.A. § 1691e(e).

2 Payne v. Diner's Club Intern., 696 F. Supp. 1153 (S.D. Ohio 1988).

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§ 168. Actions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 31, 64.1 to 67

Treatises and Practice Aids

As to private actions, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

An action for actual damages, punitive damages, or for equitable and declaratory relief may be brought in the appropriate United States District Court without regard to the amount in controversy, or in any other court of competent jurisdiction.[1] Such an action must be brought not later than five years after the date of the occurrence of the violation, except whenever any agency having responsibility for administrative enforcement, or the Attorney General, commences an enforcement proceeding or a civil action under the Equal Credit Opportunity Act (ECOA) within five years from the date of the occurrence of the violation, then any applicant who has been a victim of the discrimination which is the subject of such proceeding or action may bring an action not later than one year after the commencement of that proceeding or action.[2]

Governmental agencies having responsibility for administrative enforcement,[3] if unable to obtain compliance with the Act, are authorized to refer the matter to the Attorney General with a recommendation that an action be instituted.[4] Further, certain agencies are required to refer the matter to the Attorney General whenever the agency has reason to believe that one or more

creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of the ECOA, and such agencies may refer the matter to the Attorney General whenever the agency has reason to believe that one or more creditors has violated the ECOA.[5] When a matter is so referred, or if the Attorney General has reason to believe that one or more creditors are engaged in a pattern or practice in violation of the ECOA, he or she may bring a civil action in an appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.[6]

The ECOA does not prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedure in the court or agency in which an action or proceeding is brought.[7]

Footnotes

1 15 U.S.C.A. § 1691e(f).
2 15 U.S.C.A. § 1691e(f).
3 §§ 160, 161.
4 15 U.S.C.A. § 1691e(g).
5 15 U.S.C.A. § 1691e(g).
6 15 U.S.C.A. § 1691e(h).
7 15 U.S.C.A. § 1691e(j).

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III. Debt Collection Practices

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 211

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A. In General

§ 169. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 211

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA)[1] is a consumer protection statute that prohibits certain abusive, deceptive, and unfair debt collection practices.[2] It was enacted to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged and to promote consistent state action to protect consumers against debt collection abuses.[3]

Observation:

Actions arising out of commercial debts are not covered by the protective provisions of the FDCPA.[4]

The implementing regulation[5] applies solely to procedures for state application for exemption from the FDCPA.[6]

CUMULATIVE SUPPLEMENT

Cases:

Fair Debt Collection Practices Act (FDCPA) seeks to help consumers by preventing consumer bankruptcies in the first place. Fair Debt Collection Practices Act, § 807(a, b, e), 15 U.S.C.A. § 1692e. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).

When a consumer maintains that an underlying debt was not his, he must offer evidence to establish that the debt was a consumer debt in order to claim protection for abusive collection practices under Fair Debt Collection Practices Act (FDCPA). Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5). Burton v. Kohn Law Firm, S.C., 934 F.3d 572 (7th Cir. 2019).

Law firm's conduct while attempting to collect debt for client, in calculating prejudgment interest on debt incurred for ambulance transportation services as of time services were provided, rather than from point at which debtor received invoice for services rendered, violated both Fair Debt Collection Practices Act (FDCPA) and Massachusetts law, since in doing so, firm misrepresented the amount of the debt. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(2)(A); Mass. Gen. Laws Ann. ch. 231, § 6C. Lannan v. Levy & White, 186 F. Supp. 3d 77 (D. Mass. 2016).

The Fair Debt Collection Practices Act (FDCPA) does not apply to a creditor attempting to collect its own debts, as opposed to a third party collection agency. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692 et seq. Schroeder v. Feld, 426 F. Supp. 3d 602 (D. Neb. 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. §§ 1692 to 1692p.

2 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013).

3 15 U.S.C.A. § 1692(e).

4 Goldman v. Cohen, 445 F.3d 152 (2d Cir. 2006).

5 12 C.F.R. §§ 1006.1 et seq.

6 12 C.F.R. § 1006.1(a).

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§ 170. Legal actions by debt collectors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 211

A.L.R. Library

Construction and Application of Venue Provision of Fair Debt Collection Practices Act, 15 U.S.C.A. s1692i, 28 A.L.R. Fed. 2d 523

Although it is not to be construed to authorize the bringing of legal actions by debt collectors,[1] the Fair Debt Collection Practices Act (FDCPA) imposes certain requirements with regard to legal actions by debt collectors.[2] A debt collector who brings a legal action on a debt against any consumer must, in the case of an action to enforce an interest in real property securing the consumer's obligation, bring the action only in a judicial district or similar legal entity in which the real property is located.[3] In other cases, the action must be brought only in the judicial district or similar legal entity in which the consumer signed the contract sued upon or in which the consumer resides at the commencement of the action.[4] The term "judicial district," as applied to state-court debt collection actions under the FDCPA, must be defined in accordance with the judicial system of the state in which the debt collection action is brought.[5]

CUMULATIVE SUPPLEMENT

Cases:

Creditor's filing of proof of claim that on its face indicated that the limitations period on the underlying debt had run was not "false, deceptive, or misleading" within meaning of the Fair Debt Collection Practices Act (FDCPA). 11 U.S.C.A. § 101(5)(A); Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).

Creditor's filing of proof of claim that on its face indicated that the limitations period on the underlying debt had run was not "unfair" or "unconscionable" within meaning of the Fair Debt Collection Practices Act (FDCPA). 11 U.S.C.A. § 101(5)(A); Consumer Credit Protection Act, § 808, 15 U.S.C.A. § 1692f. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).

Debt collector did not violate Fair Debt Collection Practices Act (FDCPA) by bringing garnishment action on behalf of creditor, which was debtor's homeowners' association, in county in which debtor did not reside; underlying judgment against debtor in dispute involving unpaid homeowners' assessments was obtained in proper venue, and a garnishment action in Arizona was against the garnishee, which was debtor's employer, rather than the judgment debtor. Consumer Credit Protection Act § 811, 15 U.S.C.A. § 1692i. Randall v. Maxwell & Morgan, P.C., 321 F. Supp. 3d 978 (D. Ariz. 2018).

Any false statement made by debt owner in failing to timely file notices of dismissal in two lawsuits pursuant to global settlement agreement, whereby owner and debtor settled three state court debt collection lawsuits for single sum, was immaterial and therefore not actionable under Fair Debt Collection Practices Act (FDCPA); debt owner did not actively litigate either matter in any way before filing its notices of dismissal, debtor was not aware of any record activity in either lawsuit, debtor understood that his failure to make payments pursuant to settlement agreement would render him liable for all debts owed prior to settlement, and debtor timely made all his payments pursuant to settlement agreement. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(2)(A). Rivas v. Midland Funding LLC, 398 F. Supp. 3d 1294 (S.D. Fla. 2019).

Retroactive application of the Seventh Circuit's *Suesz* decision, 757 F.3d 636, which reinterpreted the Fair Debt Collection Practices Act's (FDCPA) phrase "judicial district or similar legal entity," concerning judicial districts in which a debt collector can sue a consumer, to mean the smallest geographic area that is relevant for determining venue in the court system in which the case is filed, is not limited to the filing of suits in the county whose judicial system was involved in the *Suesz* decision. Consumer Credit Protection Act § 811(a), 15 U.S.C.A. § 1692i(a). Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 125 F. Supp. 3d 810 (N.D. Ill. 2015).

Requests for admission served by attorney with summons and debt collection complaint that failed to inform consumer debtor of consequences under Indiana law of failing to respond to requests within 30 days were plainly deceptive or misleading within the meaning of the Fair Debt Collection Practice Act (FDCPA), where requests to admit required debtor to respond within 30 days to statements tantamount to admissions that he owed money to creditor, that he had no legal defenses to creditor's claim, and that creditor was entitled to recover against him, but failed to advise debtor of legal consequences of failure to serve timely responses, while summons unambiguously advised debtor that he faced judgment against him if he failed to file timely answer to complaint. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Patterson v. Howe, 307 F. Supp. 3d 927 (S.D. Ind. 2018).

Collection agency's prosecution of action to collect consumer's defaulted condominium association fees in state judicial district where the condominium unit was located, rather than district where the relevant contracts were signed, did not run afoul of the contracts subprovision of Fair Debt Collection Practices Act's (FDCPA) fair venue section, which required actions other than those enforcing interests in real property securing the debt to be brought in venue where contracts were signed; since debt was connected to specific piece of real estate, it was more akin to debt relating to real estate rather than a strict consumer debt, and least sophisticated consumer could more reasonably anticipate being sued for condominium fees in district where the

condominium sat than the district where contract was signed. Consumer Credit Protection Act § 811, 15 U.S.C.A. § 1692i(a)(2)(A). Elizarov v. Equity Experts LLC, 312 F. Supp. 3d 624 (E.D. Mich. 2018).

Filing a time-barred proof of claim in bankruptcy court cannot form the basis for a Fair Debt Collection Practices Act (FDCPA) claim. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Torres v. Asset Acceptance, LLC, 96 F. Supp. 3d 541 (E.D. Pa. 2015).

Consumer adequately alleged that debt collector's and law firm's misrepresentations were material, as required to state claim they violated Fair Debt Collection Practices Act (FDCPA) by suing him on defaulted credit card debt without first providing him with notice of right to cure and by falsely representing that attorney made considered legal judgment of that suit's merit; unsophisticated consumer could have been influenced to hire counsel when sued on debt he thought could not be sued on because of failure to give notice of right to cure, or when sued by corporation with assistance of counsel whom he believed had active, meaningful role in case, while without defendants' alleged deceptions consumer might have seen fit to defend claim on his own or with lessened vigor. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Boerner v. LVNV Funding LLC, 326 F. Supp. 3d 665 (E.D. Wis. 2018).

A deficiency suit following entry of final judgment of foreclosure is not a "legal action on" the underlying note and thus the venue provision of the Fair Debt Collection Practices Act (FDCPA), which applies to legal actions "on a debt," does not apply to a claim for a deficiency decree; deficiency suit is an action on the final judgment of foreclosure, which is not an obligation of a consumer to pay money and does not arise from a business dealing or consensual obligation. Fair Debt Collection Practices Act, §§ 803(5), 811, 15 U.S.C.A. §§ 1692a(5), 1692i; West's F.S.A. § 702.06. Aluia v. Dyck-O'Neal, Inc., 205 So. 3d 768 (Fla. 2d DCA 2016).

A debt collector violates the Fair Debt Collection Practices Act (FDCPA) in filing a legal action based on a time-barred debt. Fair Debt Collection Practices Act, § 807(2)(A), 15 U.S.C.A. § 1692e(2)(A). Midland Funding, L.L.C. v. Hottenroth, 2014-Ohio-5680, 26 N.E.3d 269 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692i(b).

2 15 U.S.C.A. § 1692i(a).

3 15 U.S.C.A. § 1692i(a)(1).
The venue provision under the FDCPA governing where a debt collector may bring an action to enforce a security interest in real property applies only to those who satisfy the first sentence of the definition of "debt collector," not those who only meet the definition's final sentence concerning security-interest enforcers. Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013).

4 15 U.S.C.A. § 1692i(a)(2).

5 Hess v. Cohen & Slamowitz LLP, 637 F.3d 117 (2d Cir. 2011).

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What Constitutes "Debt Collector" for Purposes of Fair Debt Collection Practices Act (15 U.S.C.A. s 1692a(6)), 173 A.L.R. Fed. 223

Law Reviews and Other Periodicals

Marshall, The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices, 94 Minn. L. Rev. 1269 (2010)

The basic term used in the Fair Debt Collection Practices Act (FDCPA) is "debt collector," which is defined in great detail, and means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.[1] The inquiry regarding whether a defendant is a debt collector is whether the defendant's

principal business is the collection of debts, not whether the defendant is engaged in any activity which has the principal purpose of collecting debts.[2] A person may regularly render debt collection services, and thus qualify as a debt collector, within the meaning of the FDCPA even if these services are not a principal purpose of the person's business.[3] The term includes any creditor who, in the process of collecting his or her own debts, uses any name other than his or her own which would indicate that a third person is collecting or attempting to collect such debts.[4] Pursuant to the false-name provision, which treats a creditor as a "debt collector" when the creditor used another name in its debt collection efforts to suggest a third person's involvement in such efforts, the creditor qualifies as a "debt collector" for purposes of liability under the FDCPA.[5] The focus of the false name exception is on whether the creditor has used a name to disguise to the consumer who is actually collecting the debt. When determining whether a representation to a debtor indicates that a third party is collecting or attempting to collect a creditor's debts, the appropriate inquiry is whether the third party is making bona fide attempts to collect the debts of the creditor or whether it is merely operating as a conduit for a collection process that the creditor controls.[6]

For the purpose of the provision providing that taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain circumstances is an unfair practice,[7] the term "debt collector" also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.[8] A person whose business has the principal purpose of enforcing security interests, but who does not otherwise satisfy the FDCPA's general definition of "debt collector," is subject only to the subsection of the FDCPA that prohibits the taking, or threatening to take, any nonjudicial action to effect dispossession or disablement of property when certain conditions are met; he or she need not comply with other provisions of the FDCPA.[9] However, the subsection of the FDCPA that prohibits the taking, or threatening to take, any nonjudicial action to effect dispossession or disablement of property when certain conditions are met is not the only FDCPA provision that regulates enforcement of security interests and not the only provision of the FDCPA with which a debt collector must comply when attempting to enforce a security interest.[10] Even though a person whose business does not primarily involve the collection of debts would not be a debt collector for purposes of the FDCPA, generally, if his or her principal business is the enforcement of security interests, he or she must comply with the provisions of the FDCPA dealing with nonjudicial repossession abuses.[11]

The term "debt collector" does not include:

- any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor[12]
- any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts[13]
- any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties[14]
- any person while serving or attempting to serve legal process or any other person in connection with the judicial enforcement of any debt[15]
- any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors[16]
- any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity: (1) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (2) concerns a debt which

was originated by such person; (3) concerns a debt which was not in default at the time it was obtained by such person; or (4) concerns a debt obtained by such person as a secured party in a commercial-credit transaction involving the creditor[17]

CUMULATIVE SUPPLEMENT

Cases:

A business that is engaged in no more than the kind of security-interest enforcement involved in nonjudicial foreclosure proceedings is not a debt collector subject to the main coverage of the Fair Debt Collection Practices Act (FDCPA) but, instead, pursuant to the Act's limited-purpose definition of the term, is only subject to the subsection of the statute prohibiting debt collectors from taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain enumerated conditions; abrogating *Kaymark v. Bank of America, N.A.*, 783 F.3d 168; *Glazer v. Chase Home Finance LLC*, 704 F.3d 453; and *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373. Consumer Credit Protection Act §§ 803, 808, 15 U.S.C.A. §§ 1692a(6), 1692f(6). Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019).

Term "debt collector," as used in the Fair Debt Collection Practices Act (FDCPA), embraces the "repo man," that is, someone hired by a creditor to collect an outstanding debt. Fair Debt Collection Practices Act, § 803(6), 15 U.S.C.A. § 1692a(6). Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Individuals and entities who regularly purchase debts originated by someone else and then seek to collect those debts for their own account are not "debt collectors" subject to the Fair Debt Collection Practices Act (FDCPA); abrogating *McKinney v. Cadleway Properties, Inc.*, 548 F.3d 496, and *FTC v. Check Investors, Inc.*, 502 F.3d 159. Fair Debt Collection Practices Act, § 803(6), 15 U.S.C.A. § 1692a(6). Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Under the Fair Debt Collection Practices Act's (FDCPA) definition, an entity has to attempt to collect debts owed another before it can ever qualify as a "debt collector." Fair Debt Collection Practices Act, § 803(6), 15 U.S.C.A. § 1692a(6). Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Bank was not "debt collector" under Fair Debt Collection Practices Act (FDCPA), even though loan assignment documentation stated that trust owned loan, where loan assignment provided that loan originator was assigning loan and loan documents to bank as trustee, and there was no allegation that primary purpose of bank's business was debt collection. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a. Skibbe v. U.S. Bank Trust, N.A. for LSF9 Master Participation Trust, 309 F. Supp. 3d 569 (N.D. Ill. 2018).

Actions taken by constables to effectuate order of restitution entered against mobile home lot tenant following default judgment in state court unlawful detainer action were beyond scope of their official duties, and thus to the extent they exceeded that scope, Fair Debt Collection Practices Act (FDCPA) exception to definition of debt collector for officials of the state did not apply; while order of restitution required constables to remove mobile home, tenant, and any other person from lot in order to restore possession of lot to operator of mobile home park, constables seized mobile home and its contents, changed the locks, and told tenant that home belonged to operator. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6)(C). Sexton v. Poulsen and Skousen P.C., 372 F. Supp. 3d 1307 (D. Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692a(6).

2 Schlegel v. Wells Fargo Bank, NA, 720 F.3d 1204 (9th Cir. 2013).

3 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004); James v. Wadas, 724 F.3d 1312 (10th Cir. 2013).

4 15 U.S.C.A. § 1692a(6).

5 Nielsen v. Dickerson, 307 F.3d 623 (7th Cir. 2002).

6 Vincent v. The Money Store, 736 F.3d 88 (2d Cir. 2013).

7 15 U.S.C.A. § 1692f(6), discussed in § 179.

8 15 U.S.C.A. § 1692a(6).

9 Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Burnett v. Mortgage Electronic Registration Systems, Inc., 706 F.3d 1231 (10th Cir. 2013).

10 Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006).

11 Piper v. Portnoff Law Associates, Ltd., 396 F.3d 227 (3d Cir. 2005).

12 15 U.S.C.A. § 1692a(6)(A).

13 15 U.S.C.A. § 1692a(6)(B).

14 15 U.S.C.A. § 1692a(6)(C).

15 15 U.S.C.A. § 1692a(6)(D).

16 15 U.S.C.A. § 1692a(6)(E).

17 15 U.S.C.A. § 1692a(6)(F).

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The term "debt collector" under the Fair Debt Collection Practices Act (FDCPA) includes an attorney who regularly engages in consumer-debt collection activity,[1] even when that activity consists of consumer debt collection litigation on behalf of a creditor client.[2] The FDCPA applies to the litigating activities of lawyers, which may include the service upon a debtor of a complaint to facilitate debt collection efforts or statements in written discovery documents.[3]

To show that an attorney or law firm "regularly collects debts" for purposes of the FDCPA, a plaintiff must show that the attorney or law firm collects debts as a matter of course for its clients or for some clients or collects debts as a substantial, but not principal, part of his, her, or its general law practice.[4] A district court should focus on the regularity of the firm's collection activity, rather than principally on the proportion of its business devoted to debt collection.[5] The determination of whether an attorney or law firm "regularly" engages in debt collection must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity.[6] In determining whether an attorney or law firm "regularly" engages in debt collection, a court must consider: (1) the absolute number of debt collection communications issued, or collection-related litigation matters pursued, over the relevant period, (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernible, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether activity is undertaken in connection with an ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debts.[7]

CUMULATIVE SUPPLEMENT

Cases:

Consumer sufficiently alleged that he was consumer who owed consumer debt to bank, and that law firm was debt collector given that law firm regularly used instrumentalities of interstate commerce or mails in collection or attempted collection of alleged obligations of consumers, and that motion filed by law firm contained false representations by omitting fact that consumer made timely answer to complaint, by not reflecting timely cure payment consumer had made, and by indicating that consumer was in default with court, as required to state claim that law firm violated Fair Debt Collection Practices Act (FDCPA) by making false or deceptive representations. 15 U.S.C.A. §§ 1692(a), 1692(e). Schendzielos v. Silverman, 139 F. Supp. 3d 1239 (D. Colo. 2015).

Consumers' allegations were sufficient to support finding that law firm that sent out debt collection letters for unpaid rent constituted a "debt collector" subject to the Fair Debt Collection Practices Act's (FDCPA) disclosure requirements for collection notices; consumers' complaint established that law firm had a pattern of drafting and sending notices on behalf of their landlord and other landlords, that notices contained virtually identical text despite coming from different landlords, from which it could be inferred that landlords merely passively provided law firm with consumers' contact information and then law firm instituted collection efforts, which included sending initial communications and filing unlawful detainer actions, and that text of communications indicated that law firm charged attorney fees for sending the letter and was not paid per letter sent, suggesting that law firm was providing more than a ministerial service. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6). Crawford v. Senex Law, P.C., 259 F. Supp. 3d 464 (W.D. Va. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Simon v. FIA Card Services, N.A., 732 F.3d 259 (3d Cir. 2013); Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012).

2 Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995); Simon v. FIA Card Services, N.A., 732 F.3d 259 (3d Cir. 2013); Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007); Hemmingsen v. Messerli & Kramer, P.A., 674 F.3d 814 (8th Cir. 2012); McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939 (9th Cir. 2011).

3 James v. Wadas, 724 F.3d 1312 (10th Cir. 2013).

4 Schroyer v. Frankel, 197 F.3d 1170, 1999 FED App. 0401P (6th Cir. 1999).

5 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004).

6 Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56 (2d Cir. 2004); James v. Wadas, 724 F.3d 1312 (10th Cir. 2013).

7 James v. Wadas, 724 F.3d 1312 (10th Cir. 2013).

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A bank which issues a credit card and its related credit-collection company are not "debt collectors" within the meaning of the Fair Debt Collection Practices Act (FDCPA).[1] The FDCPA is meant to reach only those who regularly collect debts for others and not creditors collecting on their own, and thus, does not apply to a bank which attempts to collect a debt owed itself.[2] A bank was not rendered a "debt collector" within the meaning of the FDCPA by the bank's contacting the police to investigate a possible theft by bank customers as the police were not in a business with the principal purpose of collecting debt, the police did not regularly collect debts, and the bank did not contact the police in order for the police to collect a debt.[3]

Footnotes

1 Meads v. Citicorp Credit Services, Inc., 686 F. Supp. 330 (S.D. Ga. 1988).

2 Thomasson v. Bank One, Louisiana, N.A., 137 F. Supp. 2d 721 (E.D. La. 2001).

3 Arnold v. Truemper, 833 F. Supp. 678 (N.D. Ill. 1993).

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Certain bad check enforcement programs operated by private entities are exempted from the definition of debt collector under the Fair Debt Collection Practices Act (FDCPA).[1]

A mortgage lender that is collecting debt on its own behalf is not a "debt collector" subject to the FDCPA.[2] A company in the business of repossessing vehicles does not constitute a "debt collector" in the absence of any evidence that the company contacts the debtors by any means or that the debt was assigned to the company.[3] Insurers have been found not to be "debt collectors" within the meaning of the FDCPA.[4]

A check guarantee company that contracts with merchants who accept checks from customers, and attempts to collect a fee from customers for dishonored checks, is a "debt collector" since the company's principal business is processing dishonored checks; the collection fee arises on the basis that the check, as the underlying debt, was dishonored; the checks were transactions for personal, family, or household purposes; and the checks and fees were in default at the time of attempted collection.[5]

Student loan guaranty agencies act as fiduciaries of the Department of Education (DOE) when they operate under the Federal Family Educational Loan Program (FFELP) and are thus within the "fiduciary obligation" exemption from the FDCPA's definition of "debt collector"; within the FFELP, the agencies are highly regulated, subject to requirements such as the placement of recovered loan proceeds in reserve funds to be held on behalf of the DOE Secretary.[6]

A rental property management company is not a "debt collector" when the company does not seek to collect past due rent as a debtor collector but as property manager.[7]

The definition of "debt collector" includes any nonoriginating debt holder that either acquired a debt in default or has treated the debt as if it were in default at the time of acquisition.[8] The FDCPA treats the assignee of a debt as a debt collector subject to the Act if the debt sought to be collected was in default when acquired by the assignee and as a creditor, not subject to the Act, if it was not; a purchaser of a debt in default thus qualifies as a "debt collector" subject to the FDCPA even though it owns the debt and is collecting for itself.[9] A mortgage servicing company that obtains a loan for servicing before default is not a "debt collector" under the FDCPA;[10] the exception applies even though the company does not own the debt obligation that it services and the company services the underlying debt on behalf of the contractually obligated servicer.[11] However, a loan servicer that acquires a former mortgagor's loan from the mortgagee after the loan is already in default is a "debt collector" as defined in the FDCPA.[12] A servicing agent "obtains" a debt, within the meaning of the FDCPA section excluding from the definition of debt collectors any person who tries to collect a debt that "was not in default at the time it was obtained by such person" in the sense that it acquires the authority to collect the money on behalf of another.[13]

CUMULATIVE SUPPLEMENT

Cases:

In determining whether a defendant is a "debt collector" subject to the Fair Debt Collection Practices Act (FDCPA), all that matters is whether the target of the lawsuit regularly seeks to collect debts for its own account or does so for "another." Fair Debt Collection Practices Act, § 803(6), 15 U.S.C.A. § 1692a(6). Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Patient failed to allege sufficient facts to demonstrate that hospital and its affiliates were debt collectors under the Fair Debt Collection Practices Act (FDCPA), and thus patient could not state claim for FDCPA violation; even if hospital and affiliates utilized billing department to collect debts they were owed, allegations indicated only that they sought to collect debts owed to them, thus placing them soundly, and only, in the creditor camp. Consumer Credit Protection Act §§ 803, 807, 15 U.S.C.A. §§ 1692a(4, 6), 1692e. Berger v. Hahnemann University Hospital, 765 Fed. Appx. 699 (3d Cir. 2019).

Guaranty agency under Federal Family Education Loan Program was collecting debt for United States, rather than for its own account, for purposes of determining whether it was debt collector under Fair Debt Collection Practices Act (FDCPA), when it obtained offset against borrower's Social Security benefits to recover on judgment obtained after he defaulted on his student loans, where borrower's debt was owed, or asserted to be owed, to United States, and monies obtained from borrower's Social Security benefits through Treasury offset belonged to United States Treasury, not to agency. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6). Lima v. United States Department of Education, 947 F.3d 1122 (9th Cir. 2020).

Guaranty agency's activity in collecting student loan debt was incidental to its fiduciary obligation to United States Department of Education (DOE), and thus fell within scope of Fair Debt Collection Practices Act's (FDCPA) fiduciary exception, where agency was obligated to release its judgment against borrower if borrower's debt was consolidated, rehabilitated, or repaid, and to maintain records, report to National Student Loan Database System, and properly administer its operating fund. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(6)(F). Lima v. United States Department of Education, 944 F.3d 1172 (9th Cir. 2019), opinion amended and superseded on denial of reh'g, 2020 WL 133241 (9th Cir. 2020).

Mortgagee's filing and delivery of Form 1099-C Cancellation of Debt after loan was foreclosed, without any indication that it was filed in connection with collection of debt, did not demonstrate that mortgagee was engaged in debt collection, as would support mortgagor's Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA)

claims. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692; Fla. Stat. Ann. § 559.55. Shaffer v. Servis One, Inc., 347 F. Supp. 3d 1039 (M.D. Fla. 2018).

Original lender and subsequent lender to whom original lender transferred borrower's reverse mortgage were not debt collectors, as borrower alleged in claim brought against lenders under the Fair Debt Collection Practices Act (FDCPA), where subsequent lender, in seeking to foreclose on borrower's home, was acting to collect debt on own behalf as assignee of reverse mortgage, as opposed to working to collect debt as a third party on behalf of another, and borrower did not allege that debt collection was the primary purpose of lenders' business. Consumer Credit Protection Act §§ 802, 809, 15 U.S.C.A. §§ 1692(a)(6), 1692g(b). Swango v. Nationstar Sub1, LLC, 292 F. Supp. 3d 1134 (D. Or. 2018).

Towing company that, at sheriff's direction, had towed motor vehicle belonging to judgment debtor, after sheriff seized vehicle pursuant to execution issued by state court in aid of judgment, was not acting as "debt collector" when, after being advised of judgment debtor's Chapter 13 filing, it refused to release vehicle until debtor paid its transportation and storage charges; in so acting, towing company was merely attempting to collect its own debt, and thus had no liability under the Fair Debt Collection Practices Act (FDCPA) for falsely representing status of debt or for taking action that it could not legally take. Consumer Credit Protection Act §§ 803(6), 807(2)(A), 807(5), 808(6)(A, C), 15 U.S.C.A. §§ 1692a(6), 1692e(2)(A), 1692e(5), 1692f(6)(A, C). In re Petralia, 559 B.R. 275 (Bankr. D. Mass. 2016).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692p(a)(1).

2 Book v. Mortgage Electronic Registration Systems, 608 F. Supp. 2d 277 (D. Conn. 2009); Oldroyd v. Associates Consumer Discount Company/PA, 863 F. Supp. 237 (E.D. Pa. 1994).

3 Seibel v. Society Lease, Inc., 969 F. Supp. 713 (M.D. Fla. 1997).

4 Vasquez v. Allstate Ins. Co., 937 F. Supp. 773 (N.D. Ill. 1996); Stark v. Hasty, 236 F. Supp. 2d 1214 (D. Kan. 2002).

5 Volden v. Innovative Financial Systems, Inc., 440 F.3d 947 (8th Cir. 2006).

6 Rowe v. Educational Credit Management Corp., 559 F.3d 1028 (9th Cir. 2009).

7 Reynolds v. Gables Residential Services, Inc., 428 F. Supp. 2d 1260 (M.D. Fla. 2006).

8 Bridge v. Ocwen Federal Bank, FSB, 681 F.3d 355 (6th Cir. 2012).

9 McKinney v. Cadleway Properties, Inc., 548 F.3d 496 (7th Cir. 2008).

10 Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013); Stroman v. Bank of America Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

11 Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013).

12 Yarney v. Ocwen Loan Servicing, LLC, 929 F. Supp. 2d 569 (W.D. Va. 2013).

13 Carter v. AMC, LLC, 645 F.3d 840 (7th Cir. 2011).

17 Am. Jur. 2d Consumer Protection § 175

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

III. Debt Collection Practices

B. Definitions

§ 175. Debt

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What constitutes "debt" for purposes of Fair Debt Collection Practices Act (15 U.S.C.A. s 1692a(5)), 159 A.L.R. Fed. 121

As used in the Fair Debt Collection Practices Act (FDCPA), the term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes whether or not such obligation has been reduced to judgment.[1]

A transaction's status as a "debt" under the FDCPA is determined as of the time that the obligation first arose.[2] A consensual obligation must be the basis for a transaction covered by the FDCPA.[3] Personal property taxes assessed on motor vehicles are not "debts" for purposes of the FDCPA.[4] Likewise, a per capita tax levied by a state taxing district does not constitute "debt."[5] A landowner's unpaid fines for violating the municipal code with respect to a parcel of land that he formerly owned did not constitute "debts," as defined by the FDCPA, since the fines did not stem from a consensual consumer transaction for goods and services.[6]

The focus on the underlying transaction indicates that whether an obligation is a "debt" under the FDCPA depends not on whether the obligation is secured but rather upon the purpose for which it was incurred.[7] For purposes of the FDCPA, a "debt" is still a "debt" even if it is secured.[8] Homeowners' obligations to municipalities for water and sewer charges are "debts" under the FDCPA. The fact that a lien secured the overdue water and sewer obligations did not change its character as a debt.[9]

Child support payments are not "debts" encompassed within the scope of the FDCPA.[10] The FDCPA was not applicable to a law firm's efforts to enforce property-settlement obligations imposed by a divorce decree, as the obligations, though based on a negotiated, marital-termination agreement, did not arise from a consumer transaction, and thus were not "debts," within the meaning of the FDCPA.[11] Similarly, a judgment against an ex-husband for legal fees incurred by his ex-wife in their postdivorce litigation was not incurred in connection with a consumer transaction and thus was not a "debt" within the meaning of the FDCPA even though the ex-wife incurred the fees in exchange for her attorney's services.[12]

The FDCPA's broad definition of "debt" as any obligation to pay arising from a consumer transaction applies to dishonored checks.[13] Payment using an insufficient funds (NSF) check creates a "debt" within the definition of the FDCPA, and thus an obligation created by a NSF check is subject to the FDCPA's protections.[14]

A debt incurred purely for business reasons is not covered by the FDCPA.[15]

Some courts have held that mortgage foreclosure is "debt collection" under the FDCPA since the ultimate purpose of foreclosure is the payment of money. Filing any type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is "debt collection" under the FDCPA.[16] Also, a nonjudicial foreclosure intended to dispossess the homeowner of title and ownership of real property is the type of debt collection activity that may be subject to the FDCPA.[17] However, other courts have held that nonjudicial foreclosure involving property secured by a mortgage is not "debt collection" under the FDCPA[18] and that foreclosure pursuant to a deed of trust does not constitute "debt collection" under the FDCPA.[19] Foreclosure of a mortgage, in and of itself, does not constitute debt collection as contemplated by the FDCPA.[20] However, the subsection of the FDCPA that prohibits the taking, or threatening to take, any nonjudicial action to effect dispossession or disablement of property when certain conditions are met applies to trustees performing nonjudicial foreclosures.[21]

CUMULATIVE SUPPLEMENT

Cases:

Enforcing a security interest does not grant an actor blanket immunity from the Fair Debt Collection Practices Act (FDCPA), even though security-interest enforcers are not subject to the main coverage of the Act but, rather, are only subject to the subsection of the statute prohibiting debt collectors from taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain enumerated conditions. Consumer Credit Protection Act §§ 803, 808, 15 U.S.C.A. §§ 1692a(6), 1692f(6). Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029 (2019).

Primary purpose of consumer's statutory obligation to pay highway tolls to the New Jersey Turnpike Authority was not for "personal, family, or household" services or goods, and thus, did not qualify as a "debt," within the meaning of the Fair Debt Collection Practices Act (FDCPA); highway tolls compensated state for the cost, maintenance, and repair of state highways, and provided for safer, faster, and more convenient travel in and through the state, which was public benefit, rather than a private one, and tolls resembled taxes. 15 U.S.C.A. § 1692a(5); N.J. Stat. Ann. § 27:23-1. St. Pierre v. Retrieval-Masters Creditors Bureau, Inc., 898 F.3d 351 (3d Cir. 2018).

Homeowner's obligation to repay excess grant money received to compensate for structural damage to home caused by hurricanes arose out of a transaction between homeowner and state for purposes of determining whether obligation was a debt under Fair Debt Collection Practices Act (FDCPA), where, in exchange for grant payment, homeowner consensually agreed to several conditions that aided state, such as occupying property as primary residence for three years, promising to not sell property except to a buyer who agreed to abide by the covenants, maintaining property insurance against wind, hail, and flood damage, recording covenants in parish records, and providing state with evidence of compliance with covenants. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5). Calogero v. Shows, Cali & Walsh, L.L.P., 970 F.3d 576 (5th Cir. 2020).

Judgment debtor adequately alleged that debt that was subject of underlying debt collection action and subsequent writs of execution and garnishment of her wages was consumer debt, within meaning of Fair Debt Collection Practices Act (FDCPA) and analogous California law, in action against judgment creditor's assignee and creditor's legal counsel; debtor alleged that she spoke with unidentified person with firm who told her that reason she had been sued on underlying debt was for a credit card, that defendants had refused to provide any further information about debt they sought to collect, including which entity originally issued credit card and whether card was Visa, Mastercard, or store brand card, and that every credit card she had ever had was used primarily to purchase items for personal, family or household use, such as clothes, food, gasoline, entertainment and other personal items. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692(a)(5); Cal. Civ. Code § 1788.2(e), (f). Norton v. LVNV Funding, LLC, 396 F. Supp. 3d 901 (N.D. Cal. 2019).

Unpaid rent, including overdue fees for water service, owed to landlord by tenant was a "debt" within meaning of Fair Debt Collection Practices Act (FDCPA), since amount constituted an obligation to pay money, and the subjects of the relevant transaction, i.e., the rental unit and/or water service, were primarily used for personal, family, or household purposes. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5). Lipscomb v. The Raddatz Law Firm, P.L.L.C., 109 F. Supp. 3d 251 (D.D.C. 2015).

Consumer's obligation under promissory note survived reduction to judgment in mortgage foreclosure action and remained "debt" within meaning of Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA), and, thus, action for deficiency judgment was debt collection activity that could give rise to liability under the Acts; action to collect deficiency was action to recover balance of indebtedness from consumer transaction, and since statutory right to collect on remaining indebtedness persisted post-foreclosure, under Florida law, it followed that common law doctrine of merger did not extinguish debt. Consumer Credit Protection Act §§ 803, 811, 15 U.S.C.A. §§ 1692a(5), 1692i; Fla. Stat. Ann. §§ 559.55(6), 559.72, 702.06. Rojas v. Law Offices of Daniel C. Consuegra, P.L., 142 F. Supp. 3d 1206 (M.D. Fla. 2015).

Convenience fee for use of third party's immediate payment processing service was neither debt nor incidental to debt, within meaning of Fair Debt Collection Practices Act (FDCPA) and Florida Consumer Collection Practices Act (FCCPA), and, thus, debt collector's failure to disclose $60 fee to debtor did not constitute unlawful debt collection practice in violation of either act; at time debtor paid underlying debt using payment processing service, debtor did not already owe convenience fee, such that fee was not part of what debtor owed and transferred for collection, but, rather, arose from separate transaction from transferred debt, namely, choice of immediate payment processing service to avoid delays that would arise from paying by mail or online. Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.; Fla. Stat. Ann. § 559.55 et seq. Estate of Campbell v. Ocwen Loan Servicing, LLC, 467 F. Supp. 3d 1262 (S.D. Fla. 2020).

Homeowner's obligation to repay $4,598.89 of $33,392.68 grant from Louisiana Office of Community Development (OCD) provided to compensate her for structural damage to home caused by hurricane not covered by insurance was not a debt within the meaning of the Fair Debt Collection Practices Act (FDCPA), precluding homeowner's claim thereunder against law firm and lawyers that sought to collect overpayment on behalf of state; transaction that created obligation was issuance of grant to homeowner, a condition of which was homeowner's agreement to repay any overpayments, and this was not a transaction for consumption of consumer goods or services of the sort contemplated by FDCPA. Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. Calogero v. Shows, Cali & Walsh, LLP, 385 F. Supp. 3d 483 (E.D. La. 2019).

Bank loan secured by limited liability corporation after one member faced financial difficulties did not constitute a consumer debt under the Fair Debt Collection Practices Act (FDCPA), and thus loan was not covered by FDCPA; loan was secured to help shore up member's finances so that condominium purchased by corporation would not be lost, not for personal, family, or household purposes. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a. Valhalla Investment Properties, LLC v. 502, LLC, 456 F. Supp. 3d 939 (M.D. Tenn. 2020), aff'd, 2020 WL 6268636 (6th Cir. 2020).

Default judgment entered against mobile home lot tenant in state court unlawful detainer action constituted a debt within the meaning of the Fair Debt Collection Practices Act (FDCPA), as required to support tenant's claim that attorney and law firm that obtained judgment, and constables who later sought to enforce it, used deceptive practices to collect on a debt; while attorney, firm, and constables asserted that default judgment was not a consumer debt, it was issued to include damages for mobile home park operator arising out of tenant's alleged failure to pay lot rent, which qualified as a debt within the meaning of the FDCPA. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(5); Utah Code Ann. §§ 78B-6-811, 78B-6-811(2). Sexton v. Poulsen and Skousen P.C., 372 F. Supp. 3d 1307 (D. Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692a(5).

2 F.T.C. v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007); Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC, 698 F.3d 290 (6th Cir. 2012), cert. denied, 133 S. Ct. 1726, 185 L. Ed. 2d 786 (2013).

3 Fleming v. Pickard, 581 F.3d 922 (9th Cir. 2009); Turner v. Cook, 362 F.3d 1219 (9th Cir. 2004); Oppenheim v. I.C. System, Inc., 627 F.3d 833 (11th Cir. 2010).

4 Beggs v. Rossi, 145 F.3d 511 (2d Cir. 1998).

5 Staub v. Harris, 626 F.2d 275, 62 A.L.R. Fed. 544 (3d Cir. 1980).

6 Gulley v. Markoff & Krasny, 664 F.3d 1073 (7th Cir. 2011).

7 Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013) (a home loan is a "debt" even if it is secured).

8 Reese v. Ellis, Painter, Ratterree & Adams, LLP, 678 F.3d 1211 (11th Cir. 2012).

9 Piper v. Portnoff Law Associates, Ltd., 396 F.3d 227 (3d Cir. 2005).

10 Mabe v. G.C. Services Ltd. Partnership, 32 F.3d 86 (4th Cir. 1994).

11 Hicken v. Arnold, Anderson & Dove, P.L.L.P., 137 F. Supp. 2d 1141 (D. Minn. 2001).

12 Beal v. Himmel & Bernstein, LLP, 615 F. Supp. 2d 214 (S.D. N.Y. 2009).

13 Volden v. Innovative Financial Systems, Inc., 440 F.3d 947 (8th Cir. 2006); Charles v. Lundgren & Associates, P.C., 119 F.3d 739 (9th Cir. 1997).

14 F.T.C. v. Check Investors, Inc., 502 F.3d 159 (3d Cir. 2007) (contrary to the collection company's argument that the payors' actions were criminal or tortious in nature rather than "transactions").

15 Bloom v. I.C. System, Inc., 972 F.2d 1067 (9th Cir. 1992).

16 Glazer v. Chase Home Finance LLC, 704 F.3d 453 (6th Cir. 2013).
A law firm that initiated foreclosure proceedings on a lender's behalf, pursuant to a loan secured by a deed of trust, attempted to collect "debt" within meaning of Fair Debt Collection Practices Act (FDCPA), and thus was potentially liable for violations of Act, contrary to firm's argument that foreclosure by trustee under deed of trust could not meet Act's definition of debt as an obligation to pay money because the borrower's debt ceased to be a debt once foreclosure proceedings had begun; initiation of proceedings constituted an effort to collect a debt, especially given firm's actions, including an instruction to the borrower to pay a specific amount to reinstate the account with the lender. Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006).

17 McDonald v. OneWest Bank, FSB, 929 F. Supp. 2d 1079 (W.D. Wash. 2013).

18 Diessner v. Mortgage Electronic Registration Systems, 618 F. Supp. 2d 1184 (D. Ariz. 2009), aff'd, 384 Fed. Appx. 609 (9th Cir. 2010).

19 Wensley v. First Nat. Bank of Nevada, 874 F. Supp. 2d 957 (D. Nev. 2012); Hulse v. Ocwen Federal Bank, FSB, 195 F. Supp. 2d 1188 (D. Or. 2002).

20 Derisme v. Hunt Leibert Jacobson P.C., 880 F. Supp. 2d 311 (D. Conn. 2012); Smith v. Community Lending, Inc., 773 F. Supp. 2d 941 (D. Nev. 2011); In re Ward, 448 B.R. 292 (Bankr. N.D. Ga. 2011).

21 Burnett v. Mortgage Electronic Registration Systems, Inc., 706 F.3d 1231 (10th Cir. 2013).

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17 Am. Jur. 2d Consumer Protection One III C Refs.

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Research References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 213 to 215

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A.L.R. Index, Fair Debt Collection Practices Act

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1. In General

§ 176. Acquisition of location information

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West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 213

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA) imposes certain restrictions and requirements upon a debt collector seeking location information about the consumer.[1]

Definition:

The term "location information" means a consumer's place of abode and his or her telephone number at such place or his or her place of employment.[2]

Thus, a debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must identify him- or herself, state that he or she is confirming or correcting location information, and, only if expressly requested, identify his or her employer.[3] The debt collector must not state that the consumer owes any debt,[4] communicate with any person more than once unless requested to do so by such person or unless the collector reasonably believes that the earlier response is erroneous or incomplete and that the person now has correct or complete location information,[5] communicate by postcard,[6] or use any language or symbol on any envelope or in the contents of a communication effected by the mails or telegram that indicates that the collector is in the debt collection business or that the communication relates to the collection of a debt.[7] Once the collector knows that the consumer is represented by an attorney with regard to the debt and has knowledge of or can readily ascertain the attorney's name and address, the collector is not to communicate with any person other than the attorney unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.[8]

An individual other than a debtor could bring an action against a debt collector for violation of the FDCPA provisions governing acquisition of location information and communication with third parties; violation of these provisions qualified as violations "with respect to" the consumer.[9]

Footnotes

1 15 U.S.C.A. § 1692b.
2 15 U.S.C.A. § 1692a(7).
3 15 U.S.C.A. § 1692b(1).
4 15 U.S.C.A. § 1692b(2).
5 15 U.S.C.A. § 1692b(3).
6 15 U.S.C.A. § 1692b(4).
7 15 U.S.C.A. § 1692b(5).
8 15 U.S.C.A. § 1692b(6).
9 Diaz v. D.L. Recovery Corp., 486 F. Supp. 2d 474 (E.D. Pa. 2007).

17 Am. Jur. 2d Consumer Protection § 177

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§ 177. Communications in connection with debt collection

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West's Key Number Digest, Antitrust and Trade Regulation 214

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Construction and Application of Fair Debt Collection Practices Act Provisions Regulating Third-Party Communications by Debt Collectors (5 U.S.C.A. ss1692c(b) and 1692b), 42 A.L.R. Fed. 2d 533
Construction and Application of s 805(a)(1) of Fair Debt Collection Practices Act, 15 U.S.C.A. s 1692c(a)(1), Regulating Time and Place of Communications with Consumer, 8 A.L.R. Fed. 2d 423

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

Law Reviews and Other Periodicals

Griffith, The Role of Validation and Communication and the Debt Collection Process, 43 Creighton L. Rev. 429 (2010)

Certain communications in connection with debt collection are regulated by the Fair Debt Collection Practices Act (FDCPA).[1] For the purposes of this provision, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[2]

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.[3] In the absence of knowledge or circumstances to the contrary, a debt collector must assume that the convenient time for communicating with a consumer is after 8 a.m. and before 9 p.m., local time at the consumer's location.[4] If the debt collector knows that the consumer is represented by an attorney with respect to such debt and has knowledge of or can readily ascertain the attorney's name and address, the debt collector must not communicate with the consumer unless the attorney fails to respond within a reasonable time to a communication or unless the attorney consents to direct communication with the consumer.[5] The debt collector may not communicate with the consumer in connection with the collection at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[6]

Except where the collector is attempting to acquire location information, without the prior consent of the consumer given directly to the debt collector or the express permission of a court, or as reasonably necessary to effectuate a postjudgment-judicial remedy, a debt collector may not communicate in connection with the collection of the debt with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the creditor's attorney, or the collector's attorney.[7]

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector may not communicate further with the consumer with respect to such debt except to advise the consumer that the debt collector's further efforts are being terminated, to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor, or where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[8]

The ceasing communications provision of FDCPA, as a whole, permits debt collectors to communicate freely with consumers' lawyers.[9]

A settlement offer is an example of a "specified remedy" about which a debt collector can communicate with a consumer pursuant to exceptions to the bar, under the FDCPA, on contacting a consumer who has notified the debt collector in writing that the consumer refuses to pay the debt.[10]

A debtor may waive his or her rights under the FDCPA created by a cease communication directive. A waiver of cease communication directive is enforceable only where the debtor would have understood, under a least sophisticated debtor standard, that he or she was waiving his or her rights; thus, a heightened standard of voluntariness is appropriate.[11]

CUMULATIVE SUPPLEMENT

Cases:

There was no cause to construe Fair Debt Collection Practices Act (FDCPA) in manner that interfered with Ohio's core sovereign function of collecting money owed to it, which Ohio's Attorney General (OAG) chose to do by appointing special counsel to assist, including through use of OAG's letterhead, where use of such letterhead encouraged debtors to use official channels to ensure legitimacy of letters, thus assuaging concerns about consumer confusion, and as to potential intimidation, letters' implication that consequences of failing to pay state would be more severe than failing to pay private creditors was not false, and letters did not threaten criminal prosecution or civil penalties, but merely clarified that debt was owed to state and that OAG was state's debt collector. Fair Debt Collection Practices Act, § 807(e), 15 U.S.C.A. § 1692e(e); R.C. §§ 109.08, 131.02(A, C, F). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

Debt collector violated Fair Debt Collection Practices Act (FDCPA) when it sent collection letter in envelope displaying unencrypted quick response (QR) code that, when scanned, revealed debtor's account number with debt collection agency; QR code was still susceptible to privacy intrusions, even if it did not facially display any core information relating to debt collection, and there was no material difference between disclosing account number directly on envelope and doing so via QR code. Consumer Credit Protection Act § 808, 15 U.S.C.A. § 1692f(8). DiNaples v. MRS BPO, LLC, 934 F.3d 275 (3d Cir. 2019).

Debt collector speaking to debtor's sister, by telephone, did not convey any information that would imply a debt existed, as required to constitute a prohibited communication with a third-party, in violation of Fair Debt Collection Practices Act (FDCPA); although representative identified the debt collection agency for which she worked, she did not mention a debt or directly provide any information about it, but instead indicated that she was calling about an important personal business matter, and requested that debtor call her back. Consumer Credit Protection Act § 803, 15 U.S.C.A. § 1692a(2). Fontana v. HOVG LLC, 989 F.3d 338 (5th Cir. 2021).

Envelope enclosing letter sent to consumer by debt collector, with glassine window through which were visible two unmarked checkboxes for options of either enclosing payment in full or discussing issue further, violated provision of Fair Debt Collection Practices Act (FDCPA) prohibiting the use of any language or symbol than the debt collector's address and business name if name did not indicate debt collection; symbols and language visible through window played no role in ensuring the successful delivery of the letter, nor were they debt collector's address or an allowable business name. Consumer Credit Protection Act § 808, 15 U.S.C.A. § 1692f(8). Donovan v. FirstCredit, Inc., 983 F.3d 246 (6th Cir. 2020).

A business whose name evidences it is in the debt collection business cannot display its name on the face of an envelope to a debtor, without violating the Fair Debt Collection Practices Act (FDCPA). Consumer Credit Protection Act § 808, 15 U.S.C.A. § 1692f(8). Cagayat v. United Collection Bureau, Inc., 952 F.3d 749 (6th Cir. 2020).

Section of the Fair Debt Collection Practices Act (FDCPA) prohibiting a debt collector from using any language or symbol, other than the debt collector's business name or address, on any envelope when communicating with a consumer draws a clear line to ensure that consumers rights are not lost in the interpretation of more subtle language; this approach provides certainty to debt collectors and avoids the problem of having to decide on a case-by-case basis what language or symbols intrude into the privacy of the debtor or otherwise constitute an unfair or unconscionable means to collect or attempt to collect a debt. Consumer Credit Protection Act § 808, 15 U.S.C.A. §§ 1692f, 1692f(8). Preston v. Midland Credit Management, Inc., 948 F.3d 772 (7th Cir. 2020).

Law firm and attorney, while representing credit card company in attempting to collect debt from company's purported debtor, did not violate Fair Debt Collection Practices Act (FDCPA); attorney wrote purported debtor to advise that her account with company was referred to collection and explained, inter alia, ways to dispute that debt, attorney and law firm had no additional contact with purported debtor until several months later when they commenced collection action by properly serving her with summons and complaint, after each of purported debtor's requests for validation, firm provided such validation, including correct amount of debt, original creditor, and account statements reflecting payments and purchases, and, following bench trial in collection action, court ruled against purported debtor and in favor of company. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692. Shorts-Watson v. Schlee & Stillman, LLC, 24 F. Supp. 3d 386 (D. Del. 2013).

Letters sent to mortgagor by mortgage servicer were not communications sent in connection with the collection of a debt, thus precluding mortgagor's FDCPA claims against the servicer; first letter merely informed mortgagor that his hazard insurance policy had expired, second and third letters indicated that servicer had received correspondence from mortgagor regarding his account and informed him that he could seek assistance options if he was experiencing financial hardship, but did not reference any debt, and although the fourth and fifth letters did reference a loan, they did not contain any specifics regarding the debt, did not demand payment, and did not threaten consequences if the debt was not paid. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Dyer v. Select Portfolio Servicing, Inc., 108 F. Supp. 3d 1278 (M.D. Fla. 2015).

Debt collector violated the Fair Debt Collection Practices Act (FDCPA) by failing to register to collect consumer debts in Florida and then attempting to collect purported debt from consumer by sending letter threatening to take legal action that it was not authorized to take in its capacity as debt collector, without first registering under the Florida Consumer Collection Practices Act (FCCPA); debt collector's letter violated substantive provisions of FDCPA, it would lead a consumer to wrongfully believe that debt collector was lawfully permitted to directly engage consumer for repayment of outstanding debt, that debt collector could take legal action in its capacity as an unlicensed Florida debt collector, to recover the debt, and it would lead a consumer to conclude that debt collector threatened legal action that debt collector could not legally take in its capacity as an unlicensed debt collector under Florida law. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e; Fla. Stat. Ann. § 559.553. Lee v. McCarthy, 297 F. Supp. 3d 1343 (S.D. Fla. 2017).

Medical debt collector violated Fair Debt Collection Practices Act (FDCPA) provision prohibiting communication with consumers in connection with collection of debt if debt collector knew consumer was represented by an attorney, where debt collector called patient regarding debt after receiving letter from her attorney stating that patient was represented and providing firm's phone number and address. Consumer Credit Protection Act § 805, 15 U.S.C.A. § 1692c(a)(2). Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692c.
The term "communication" is defined at 15 U.S.C.A. § 1692a(2).

2 15 U.S.C.A. § 1692c(d).

3 15 U.S.C.A. § 1692c(a)(1).
For a communication to be in connection with the collection of a debt and subject to the FDCPA, an animating purpose of the communication must be to induce payment by the debtor. Grden v. Leikin Ingber & Winters PC, 643 F.3d 169 (6th Cir. 2011).

4 15 U.S.C.A. § 1692c(a)(1).

5 15 U.S.C.A. § 1692c(a)(2).

6 15 U.S.C.A. § 1692c(a)(3).

7 15 U.S.C.A. § 1692c(b).
As to the acquisition of location information, see § 176.

8 15 U.S.C.A. § 1692c(c).

9 Tinsley v. Integrity Financial Partners, Inc., 634 F.3d 416 (7th Cir. 2011).

10 Cruz v. International Collection Corp., 673 F.3d 991, 81 Fed. R. Serv. 3d 1118 (9th Cir. 2012).

11 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).

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17 Am. Jur. 2d Consumer Protection § 178

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Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

1. In General

§ 178. Harassment or abuse

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 215

A.L.R. Library

What Constitutes Harassment or Abuse Under Provisions of Fair Debt Collection Practices Act, 15 U.S.C.A. s1692d, Which Proscribes Conduct the Natural Consequence of Which Is to Harass, Oppress, or Abuse Any Person in Connection with Collection of Debt, 9 A.L.R. Fed. 2d 645

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

Forms

Forms relating to harassment, generally, see Am. Jur. Pleading and Practice Forms—Collection and Credit Agencies [Westlaw® Search Query]

A debt collector is prohibited by the Fair Debt Collection Practices Act (FDCPA) from engaging in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, which includes the following specific conduct:[1]

• the use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person

• the use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader

• the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency

• the advertisement for sale of any debt to coerce payment of the debt

• causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number

• the placement of telephone calls without meaningful disclosure of the caller's identity

This list is nonexclusive.[2]

In determining whether a debt collector harassed a debtor in violation of the FDCPA, courts consider the volume and pattern of calls made to the debtor.[3]

The FDCPA's prohibitions against abusive, deceptive, or unconscionable acts in connection with debt collection are applicable to representations made to the consumer's lawyer as well as to representations made directly to the consumer.[4]

CUMULATIVE SUPPLEMENT

Cases:

Mortgagor failed to state claim against mortgage loan servicer under provision of Fair Debt Collection Practices Act (FDCPA) stating that a debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, where mortgagor did not allege that servicer called her during the early morning or late evening hours, that servicer used abusive or threatening language, or that servicer incorrectly reported debt to credit reporting agencies to abuse or harass her. Consumer Credit Protection Act § 806, 15 U.S.C.A. § 1692d. Owens-Benniefield v. Nationstar Mortgage LLC, 258 F. Supp. 3d 1300 (M.D. Fla. 2017).

Alleged telephone calls between mortgage servicing company and mortgagor could not be a basis for mortgagor's claim of harassing communications in violation of the Fair Debt Collection Practices Act (FDCPA), even assuming that mortgage service provider was a debt collector under the FDCPA, absent evidence showing that mortgagor received the alleged calls. Consumer Credit Protection Act § 806, 15 U.S.C.A. §§ 1692d(5), 1692d(6). Hochroth v. Ally Bank, 461 F. Supp. 3d 986 (D. Haw. 2020).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692d.

2 Diaz v. D.L. Recovery Corp., 486 F. Supp. 2d 474 (E.D. Pa. 2007).

3 Carman v. CBE Group, Inc., 782 F. Supp. 2d 1223 (D. Kan. 2011).

4 Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007).
As to false, deceptive, or misleading representations to lawyers, see § 182.

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17 Am. Jur. 2d Consumer Protection § 179

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C. Prohibited, Permitted, or Required Practices

1. In General

§ 179. Unfair practices

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 213

A.L.R. Library

Construction and Application of Provision of Fair Debt Collections Practices Act Concerning Use of Language or Symbol on Mailed Envelope, 15 U.S.C.A. sec. 1692f(8), 5 A.L.R. Fed. 2d 605

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA) provides that a debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. The FDCPA designates the conduct which is considered to be a violation thereof, without limiting the general application of the statute.[1]

The following conduct is designated as violative of the statute:

- the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law[2]
- the acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than 10 nor less than three business days prior to such deposit[3]
- the solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution[4]
- depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument[5]
- causing charges to be made to any person for communications by concealment of the true purpose of the communication; such charges include, but are not limited to, collect telephone calls and telegram fees[6]
- taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest, there is no present intention to take possession of the property, or the property is exempt by law from such dispossession or disablement[7]
- communicating with a consumer regarding a debt by post card[8]
- using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram except that a debt collector may use his or her business name if such name does not indicate that he or she is in the debt collection business[9]

A claim under the FDCPA provision prohibiting a debt collector from "using unfair or unconscionable means to collect or attempt to collect any debt" should be viewed through the lens of the "least-sophisticated consumer."[10]

CUMULATIVE SUPPLEMENT

Cases:

A complaint fails to state a claim under the provision of the Fair Debt Collection Practices Act (FDCPA) prohibiting unfair or unconscionable means to collect or attempt to collect any debt, unless it identifies some misconduct by the debt collector other than that which provides the basis for the plaintiff's claims under other provisions of the FDCPA. Fair Debt Collection Practices Act, § 808(1), 15 U.S.C.A. § 1692f(1). Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp. 3d 610, 90 Fed. R. Serv. 3d 1332 (E.D. Pa. 2015).

Irreconcilable conflict existed between the Fair Debt Collection Practices Act (FDCPA), which prevented a debt collector from filing a proof of claim on a time-barred debt despite having a right to payment under state law, and the Bankruptcy Code, which allowed the same claim to be filed, such that application of the FDCPA was precluded by the Bankruptcy Code in adversary proceeding by Chapter 13 debtor for creditors' alleged violation of the FDCPA in filing a proof of claim for a time-barred debt. 11 U.S.C.A. §§ 101(5)(A), 501(a); Consumer Credit Protection Act, § 808, 15 U.S.C.A. § 1692f. In re Moses, 542 B.R. 5 (Bankr. N.D. Ala. 2015).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692f.
2 15 U.S.C.A. § 1692f(1).
3 15 U.S.C.A. § 1692f(2).
4 15 U.S.C.A. § 1692f(3).
5 15 U.S.C.A. § 1692f(4).
6 15 U.S.C.A. § 1692f(5).
7 15 U.S.C.A. § 1692f(6).
8 15 U.S.C.A. § 1692f(7).
9 15 U.S.C.A. § 1692f(8).
10 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010).

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C. Prohibited, Permitted, or Required Practices

1. In General

§ 180. Validation of debts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 213

A.L.R. Library

Construction and Application of Provision of Fair Debt Collection Practices Act Relating To Validation of Debts (15 U.S.C.A. sec. 1692g), 150 A.L.R. Fed. 101

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

Law Reviews and Other Periodicals

Griffith, The Role of Validation and Communication and the Debt Collection Process, 43 Creighton L. Rev. 429 (2010)

The Fair Debt Collection Practices Act (FDCPA) provides that within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector must, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing:

(1) the amount of the debt;[1]

(2) the name of the creditor to whom the debt is owed;[2]

(3) a statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;[3]

(4) a statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer, and a copy of such verification or judgment will be mailed to the consumer by the debt collector;[4] and

(5) a statement that, upon the consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[5]

Caution:

There is some confusion regarding whether this statute[6] requires that a consumer must dispute the validity of the debt in writing, with some courts holding a writing is required[7] and others holding that it is not.[8]

The recipient of a debt collection letter covered by the FDCPA validly invokes the right to have the debt verified whenever he or he she mails a notice of dispute within 30 days of receiving a communication from the debt collector.[9] A consumer's request to verify the existence of a debt constitutes a "dispute" under the FDCPA.[10]

At the minimum, verification of a debt involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed.[11]

A communication in the form of a formal pleading in a civil action may not be treated as an initial communication.[12] The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by Title 26, title V of Gramm-Leach-Bliley Act, or any provision of federal or state law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, also may not be treated as an initial communication in connection with debt collection.[13]

If the consumer notifies the debt collector in writing within the 30-day period that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector must cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate the FDCPA may continue during the 30-day period unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.[14]

Any written notice sent to the lawyer must contain the information that would be required by the FDCPA if the notice were sent to the consumer directly.[15]

Merely including the statutorily required notice in letters to consumers is not sufficient to satisfy the notification requirements of the FDCPA.[16] To satisfy the validation notice requirements, a letter sent by a debt collection agency to a debtor must effectively convey the notice that Congress required of the debtor's right to dispute the debt, the notice must be large enough to be easily read, must be sufficiently prominent to be noticed,[17] and must not be overshadowed or contradicted by other messages or notices appearing in the letter.[18]

When determining whether there has been a violation of the provision of the FDCPA requiring a debt collector to provide a detailed, validation notice to a consumer, an objective standard, measured by how the least sophisticated consumer would interpret the notice received from the debt collector, is applied.[19] For purposes of reviewing a collection letter for compliance with the validation notice requirements of the FDCPA, the hypothetical unsophisticated debtor is regarded as uninformed, naive, or trusting but nonetheless is considered to have a rudimentary knowledge about the financial world and is capable of making basic logical deductions and inferences.[20] Although the "least sophisticated debtor" standard is less demanding than one that inquires whether a particular communication subject to the FDCPA would mislead or deceive a reasonable debtor, the standard does not go so far as to provide solace to the willfully blind or nonobservant; the debtor is still held to a quotient of reasonableness, a basic level of understanding, and a willingness to read with care, and accordingly, the debt collector cannot be held liable for bizarre or idiosyncratic interpretations.[21] A significant fraction of the population must find a debt collection letter to be confusing in order to violate the prohibition under the FDCPA of inconsistent or overshadowing language.[22] In cases where debt collectors send debtors an FDCPA validation notice either along with a summons and complaint or shortly thereafter, to avoid confusing the debtor, it is imperative that a debt collector (1) make clear that the advice contained in the validation notice in no way alters the debtor's rights or obligations with respect to the lawsuit, and (2) emphasize that courts set different deadlines for filings that may differ from the deadlines under the FDCPA.[23]

Practice Tip:

The failure of a consumer to dispute the validity of a debt under the statute may not be construed by a court as an admission of liability by the consumer.[24]

CUMULATIVE SUPPLEMENT

Cases:

FDCPA provision requiring consumer to dispute validity of debt within 30-days is not a prerequisite to filing an FDCPA claim; statute's plain language provided a cause of action for a debt collector's violation of any provision of the FDCPA, and validation provision did not alter statute's plain language. Fair Debt Collection Practices Act, §§ 807, 809, 813, 15 U.S.C.A. §§ 1692e, 1692g, 1692k. Eide v. Colltech, Inc., 987 F. Supp. 2d 951 (D. Minn. 2013).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692g(a)(1).

2 15 U.S.C.A. § 1692g(a)(2).

3 15 U.S.C.A. § 1692g(a)(3).

4 15 U.S.C.A. § 1692g(a)(4).

5 15 U.S.C.A. § 1692g(a)(5).

6 15 U.S.C.A. § 1692g(a)(3).

7 Caprio v. Healthcare Revenue Recovery Group, LLC, 709 F.3d 142 (3d Cir. 2013); Sturdevant v. Thomas E. Jolas, P.C., 942 F. Supp. 426 (W.D. Wis. 1996).

8 Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282 (2d Cir. 2013); Clark v. Absolute Collection Service, Inc., 741 F.3d 487 (4th Cir. 2014) (a debt collector's collection notice violated the FDCPA in so far as it stated that disputes of validity of debts had to be in writing); Riggs v. Prober & Raphael, 681 F.3d 1097 (9th Cir. 2012); Baez v. Wagner & Hunt, P.A., 442 F. Supp. 2d 1273 (S.D. Fla. 2006).

9 Jacobson v. Healthcare Financial Services, Inc., 516 F.3d 85 (2d Cir. 2008).

10 Gruber v. Creditors' Protection Service, Inc., 2014 WL 292086 (7th Cir. 2014).

11 Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162 (9th Cir. 2006).

12 15 U.S.C.A. § 1692g(d).

13 15 U.S.C.A. § 1692g(e).

14 15 U.S.C.A. § 1692g(b).

15 Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007).

16 McMurray v. ProCollect, Inc., 687 F.3d 665 (5th Cir. 2012).

17 Caprio v. Healthcare Revenue Recovery Group, LLC, 709 F.3d 142 (3d Cir. 2013); United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996); Terran v. Kaplan, 109 F.3d 1428, 37 Fed. R. Serv. 3d 467 (9th Cir. 1997).

18 Caprio v. Healthcare Revenue Recovery Group, LLC, 709 F.3d 142 (3d Cir. 2013); McMurray v. ProCollect, Inc., 687 F.3d 665 (5th Cir. 2012); Terran v. Kaplan, 109 F.3d 1428, 37 Fed. R. Serv. 3d 467 (9th Cir. 1997); Spira v. Ashwood Financial, Inc., 358 F. Supp. 2d 150 (E.D. N.Y. 2005).

19 Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996).

20 Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir. 2012), cert. denied, 133 S. Ct. 584, 184 L. Ed. 2d 376 (2012).

21 Caprio v. Healthcare Revenue Recovery Group, LLC, 709 F.3d 142 (3d Cir. 2013).

22 Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir. 2012), cert. denied, 133 S. Ct. 584, 184 L. Ed. 2d 376 (2012).

23 Goldman v. Cohen, 445 F.3d 152 (2d Cir. 2006).

24 15 U.S.C.A. § 1692g(c).

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Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

1. In General

§ 181. Use of deceptive forms

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 213

Under the Fair Debt Collection Practices Act (FDCPA), it is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor when in fact such person is not so participating.[1] Any person who violates this provision is liable to the same extent and in the same manner as a debt collector is liable under the civil liability provision for failure to comply with a provision of the FDCPA.[2]

Footnotes

1 15 U.S.C.A. § 1692j(a).

2 15 U.S.C.A. § 1692j(b).
As to civil liability, see § 189.

17 Am. Jur. 2d Consumer Protection § 182

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Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

2. False, Deceptive, or Misleading Representations or Means

§ 182. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

A.L.R. Library

What Constitutes False Representation or Implication That Individual Is Attorney or That Communication Is From Attorney in Connection With Collection of Debt Proscribed by Provisions of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692e(3)), 22 A.L.R. Fed. 2d 637

What constitutes false, deceptive or misleading representation or means in connection with collection of debt proscribed by provisions of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692e), 67 A.L.R. Fed. 974 (sec. 3(d) superseded in part by What Constitutes False Representation or Implication That Individual Is Attorney or That Communication Is From Attorney in Connection With Collection of Debt Proscribed by Provisions of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692e(3)), 22 A.L.R. Fed. 2d 637)

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA) prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. This provision of the Act designates specific conduct which is a violation of the statute but without limiting the general application thereof.[1]

A statement must be materially false or misleading to be actionable under this provision[2] and, as a result, if a representation would not mislead or deceive with respect to the debt, it is not actionable even if it is technically false.[3] However, a failure to disclose need not be material.[4]

Communications from lenders to debtors are analyzed from the perspective of the "least sophisticated consumer"[5] rather than a "reasonable consumer."[6] Whether a debt collector's actions are false, deceptive, or misleading is based on whether the least sophisticated consumer would be misled by the defendant's actions.[7] The test is objective, and asks whether there is a reasonable likelihood that an unsophisticated consumer who is willing to consider carefully the contents of a communication might yet be misled by them.[8] Under this test, collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate.[9] However, the FDCPA protection does not extend to every bizarre or idiosyncratic interpretation of a collection notice, and courts should apply the least sophisticated consumer standard in a manner that protects debt collectors against liability for unreasonable misinterpretations of collection notices.[10] The unsophisticated debtor under the FDCPA is uninformed, naive, and trusting, but is also assumed to possess rudimentary knowledge about the financial world and is capable of making basic logical deductions and inferences.[11] The least sophisticated debtor standard preserves a quotient of reasonableness and presumes a basic level of understanding and willingness to read with care.[12] However, the unsophisticated consumer test is an objective one, meaning that it is unimportant whether the individual that actually received a violative letter was misled or deceived.[13] A plaintiff may prevail on a "false, deceptive, or misleading" claim under the FDCPA, when debt collection language that is not misleading or confusing on its face but has the potential to be misleading to the unsophisticated consumer, only by producing extrinsic evidence, such as consumer surveys, to prove that unsophisticated consumers do in fact find the challenged statements misleading or deceptive.[14] Truth is not always a defense under the least-sophisticated consumer test since sometimes even a true statement can be misleading.[15]

Some courts have held that the FDCPA's prohibitions against making false, deceptive, or misleading representations, in connection with debt collection, are applicable to representations made to the consumer's lawyer, as well as to representations made directly to the consumer.[16] However, other courts have held that communications directed only to a debtor's attorney, and unaccompanied by any threat to contact the debtor, are not actionable under the FDCPA.[17]

Observation:

A debt collection practice can be a "false, deceptive, or misleading" practice in violation of the FDCPA even if it does not fall within any of the Act's nonexhaustive list of banned practices.[18] A consumer alleging that a debt collection practice was "false, deceptive, or misleading," in violation of the FDCPA, is not required to prove a violation of any particular subpart of the statute.[19]

CUMULATIVE SUPPLEMENT

Cases:

To determine whether a statement is "misleading" within meaning of the Fair Debt Collection Practices Act (FDCPA) normally requires consideration of the legal sophistication of its audience. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017).

When sending debt collection letters, use of Ohio Attorney General's (OAG) letterhead at OAG's direction by attorneys and law offices that OAG had appointed to act as special counsel to collect debts owed to the State of Ohio, did not offend Fair Debt Collection Practices Act's (FDCPA) general prohibition against false or misleading representations, where letterhead identified OAG as principal and signature block named special counsel as agent, letters included special counsel's separate contact information and made conspicuous notation that letter was sent by debt collector, and special counsel were closely allied with attorneys within OAG's office. Fair Debt Collection Practices Act, § 807(e), 15 U.S.C.A. § 1692e(e); R.C. §§ 109.08, 131.02(A, C, F). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

Fair Debt Collection Practices Act (FDCPA) bars debt collectors from deceiving or misleading consumers, but it does not protect consumers from fearing the actual consequences of their debts. Fair Debt Collection Practices Act, § 807(e), 15 U.S.C.A. § 1692e(e). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

Mortgagor sufficiently alleged injury in fact and, thus, had standing to bring action against mortgage-loan service and its law firm for violations of Fair Debt Collection Practices Act (FDCPA); claims were based on allegedly incorrect identification of servicer as creditor in foreclosure complaint, certificate of merit, and request for judicial intervention, and taken as true, misrepresentation might have deprived mortgagor of information relevant to debt prompting foreclosure proceeding, posing risk of real harm insofar as it could hinder exercise of his right to defend or otherwise litigate that action. Consumer Credit Protection Act §§ 807, 809, 15 U.S.C.A. §§ 1692e, 1692g. Cohen v. Rosicki, Rosicki & Associates, P.C., 897 F.3d 75 (2d Cir. 2018).

Debt collector did not violate Fair Debt Collection Practices Act (FDCPA) when representative asked why debtor wished to dispute debt; questions were not misleading or abusive, and least sophisticated consumer would have interpreted representative not as threatening debtor, or even conveying false information about his debt, but rather as endeavoring to learn more about debtor's dispute in order to resolve it. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Huebner v. Midland Credit Management, Inc., 897 F.3d 42 (2d Cir. 2018).

Consumer's complaint did not plausibly allege that verification of mortgage account sent by mortgage servicer after consumer's mortgage debt was discharged in bankruptcy was in connection with the collection of debt, within meaning of Fair Debt Collection Practices Act (FDCPA), and thus, consumer failed to state claims for FDCPA violations by allegedly false representation of character, amount, or legal status of debt, threat to take action that could not legally be taken, and false representation or deceptive means to collect debt; verification was sent in response to consumer's request, did not demand payment, provided general information, listed due date that was same as last pay date, and placed debt collection bankruptcy disclaimer by itself at bottom of page. Consumer Credit Protection Act §§ 802, 807, 15 U.S.C.A. §§ 1692(2)(A), 1692e(5), 1692e(10). Tabb v. Ocwen Loan Servicing, LLC, 798 Fed. Appx. 726 (3d Cir. 2020).

Debt collector's voicemail messages were not materially deceptive, misleading, or false, and thus debt collector did not violate Fair Debt Collection Practices Act (FDCPA) provision prohibiting use of false representations or deceptive means; message revealed that caller was a debt collector, that call was part of attempt to collect a debt, and that any information obtained would be used in that attempt. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(10). Levins v. Healthcare Revenue Recovery Group LLC, 902 F.3d 274 (3d Cir. 2018).

When debt collection language is not deceptive or misleading on its face, but could be construed so as to be confusing or misleading to the unsophisticated consumer, plaintiff cannot prevail on claim against debt collector for false, deceptive, or misleading communications, in violation of Fair Debt Collection Practices Act (FDCPA) without producing extrinsic evidence, such as consumer surveys, tending to show that unsophisticated consumers are in fact confused or misled by the challenged language. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Johnson v. Enhanced Recovery Company, LLC, 961 F.3d 975 (7th Cir. 2020).

Debt collection letters sent to debtors, which stated names for original creditor, which was a bank, and for client, which was an online payment and credit service for online purchases that used a commercial name to which debtors had been exposed, and also stated that, upon debtor's request, debt collector would provide name and address of original creditor if different from current creditor, identified the creditor to whom the debt was owed in a manner clear enough for an unsophisticated consumer to understand, and thus, there was no violation of provision of Fair Debt Collection Practices Act (FDCPA) requiring a debt collector to send a written notice to a consumer, in connection with initial communication, that included name of creditor to whom the debt was owed, nor a violation of FDCPA provision prohibiting deceptive or misleading representations. Consumer Credit Protection Act §§ 807(e), 809(a)(2), 15 U.S.C.A. §§ 1692e, 1692g(a)(2). Smith v. Simm Associates, Inc., 926 F.3d 377 (7th Cir. 2019).

Mortgage agreement between mortgage loan servicer and borrower authorized servicer to charge borrower inspection fees in event of borrower's default, and thus borrower could not maintain claim against servicer alleging that servicer violated numerous provisions of the Fair Debt Collection Practices Act (FDCPA) by charging borrower for property inspection fees and representing it had the right to collect a balance including those fees following borrower's default on mortgage loan; mortgage agreement explicitly authorized servicer to conduct an inspection in the event of borrower's default, borrower's default was undisputed, and agreement authorized lender to add to borrower's debt any amounts disbursed in pursuit of protecting the value of borrower's home, as well as lender's own rights. Consumer Credit Protection Act § 807, 15 U.S.C.A. §§ 1692e(2), 1692e(5), 1692e(10), 1692f(1); 24 C.F.R. § 203.377. Dawoudi on behalf of Plaintiff v. Nationstar Mortgage LLC, 448 F. Supp. 3d 918 (N.D. Ill. 2020).

Debt collector's statement in letter offering to settle debtor's $951.29 credit card debt for $237.82, that IRS required certain discharged amounts to be reported on specific form and that debtor would receive copy of form if one was required to be filed with IRS, was not deceptive on its face, and thus did not violate the Fair Debt Collection Practices Act (FDCPA) or Illinois Collection Agency Act (ICAA); it was possible that debtor's acceptance of offer could result in forgiving $600 in principal, even though debtor's credit card limit was $600, and federal law required lender to file form reporting the discharge of a debt only if the amount discharged consisted of at least $600 in principal. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e; 26 U.S.C.A. § 6050P(a); 225 Ill. Comp. Stat. Ann. 425/9(a)(21); 26 C.F.R. § 1.6050P-1(a). Moses v. LTD Financial Services I, Inc., 275 F. Supp. 3d 893 (N.D. Ill. 2017).

Genuine issue of material fact existed as to whether debt collector's use of the term "corporate advances" in demand letter to refer to attorney fees and property inspection fees would be materially misleading to an unsophisticated consumer, precluding summary judgment on debtor's claim that debt collector violated the FDCPA's prohibition on false or misleading representations made in connection with an attempt to collect a debt. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Wilson v. Trott Law, P.C., 118 F. Supp. 3d 953 (E.D. Mich. 2015).

It is a question of law left to the courts as to whether the language in a collection letter overshadows or contradicts the Fair Debt Collection Practices Act (FDCPA) validation notice. Consumer Credit Protection Act § 809, 15 U.S.C.A. § 1692g(a). Gottesman v. Virtuoso Souring Group, LLC, 400 F. Supp. 3d 81 (D.N.J. 2019).

Dispute as to whether a collection letter is deceptive or misleading in violation of the Fair Debt Collection Practices Act (FDCPA) may be ruled on as a matter of law. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. In re Murray, 552 B.R. 1 (Bankr. D. Mass. 2016).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692e.

2 Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323 (6th Cir. 2012); Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009); Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012); Hahn v. Triumph Partnerships LLC, 557 F.3d 755 (7th Cir. 2009); Donohue v. Quick Collect, Inc., 592 F.3d 1027 (9th Cir. 2010).

3 Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009); Hahn v. Triumph Partnerships LLC, 557 F.3d 755 (7th Cir. 2009); Donohue v. Quick Collect, Inc., 592 F.3d 1027 (9th Cir. 2010).

4 § 187.

5 Lesher v. Law Offices Of Mitchell N. Kay, PC, 650 F.3d 993 (3d Cir. 2011), cert. denied, 132 S. Ct. 1143, 181 L. Ed. 2d 1030 (2012); Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 83 Fed. R. Serv. 3d 96 (9th Cir. 2012); LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010).

6 LeBlanc v. Unifund CCR Partners, 601 F.3d 1185 (11th Cir. 2010).

7 Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323 (6th Cir. 2012); Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015, 83 Fed. R. Serv. 3d 96 (9th Cir. 2012).

8 Grden v. Leikin Ingber & Winters PC, 643 F.3d 169 (6th Cir. 2011).

9 Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012); Campuzano-Burgos v. Midland Credit Management, Inc., 550 F.3d 294 (3d Cir. 2008); Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).

10 Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012); Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011); DeHart v. U.S. Bank, N.A. ND, 811 F. Supp. 2d 1038, 75 U.C.C. Rep. Serv. 2d 348 (D.N.J. 2011); Moore v. Diversified Collection Services, Inc., 843 F. Supp. 2d 280 (E.D. N.Y. 2012).

11 Ruth v. Triumph Partnerships, 577 F.3d 790 (7th Cir. 2009).

12 Lesher v. Law Offices Of Mitchell N. Kay, PC, 650 F.3d 993 (3d Cir. 2011), cert. denied, 132 S. Ct. 1143, 181 L. Ed. 2d 1030 (2012).

13 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012).

14 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012).

15 Grden v. Leikin Ingber & Winters PC, 643 F.3d 169 (6th Cir. 2011).

16 Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007); Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007).

17 Guerrero v. RJM Acquisitions LLC, 499 F.3d 926 (9th Cir. 2007); Villegas v. Weinstein & Riley, P.S., 723 F. Supp. 2d 755 (M.D. Pa. 2010).

18 Lesher v. Law Offices Of Mitchell N. Kay, PC, 650 F.3d 993 (3d Cir. 2011), cert. denied, 132 S. Ct. 1143, 181 L. Ed. 2d 1030 (2012); Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012).

19 Lox v. CDA, Ltd., 689 F.3d 818 (7th Cir. 2012).

17 Am. Jur. 2d Consumer Protection § 183

American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection
Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

2. False, Deceptive, or Misleading Representations or Means

§ 183. False representations or implications

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

A.L.R. Library

What Constitutes False Representation or Implication That Individual Is Attorney or That Communication Is From Attorney in Connection With Collection of Debt Proscribed by Provisions of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692e(3)), 22 A.L.R. Fed. 2d 637

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

Forms

Forms relating to referral of claim for collection, generally, see Am. Jur. Legal Forms 2d—Collection and Credit Agencies [Westlaw® Search Query]

A false representation in connection with the collection of a debt is sufficient to violate the Fair Debt Collection Practices Act (FDCPA) facially even where no misleading or deception is claimed.[1] The following conduct constitutes a violation of the FDCPA:

- the false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any state, including the use of any badge, uniform, or facsimile thereof[2]
- the false representation of the character, amount, or legal status of any debt, or any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt[3]
- the false representation or implication that any individual is an attorney or that any communication is from an attorney[4]
- the false representation or implication that the nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action[5]
- the false representation or implication that a sale, referral, or other transfer of any interest in a debt will cause the consumer to lose any claim or defense to payment of the debt or become subject to any practice prohibited by the FDCPA[6]
- the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer[7]
- the false representation or implication that accounts have been turned over to innocent purchasers for value[8]
- the false representation or implication that documents are legal process[9]
- the use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization[10]
- the false representation or implication that documents are not legal process forms or do not require action by the consumer[11]
- the false representation or implication that a debt collector operates or is employed by a consumer reporting agency[12]

When the expiration of the statute of limitations does not invalidate a debt but merely renders it unenforceable, the FDCPA permits a debt collector to seek voluntary repayment of the time-barred debt so long as the debt collector does not initiate or threaten legal action in connection with its debt collection efforts.[13]

CUMULATIVE SUPPLEMENT

Cases:

When sending debt collection letters, use of Ohio Attorney General's (OAG) letterhead at OAG's direction by attorneys and law offices that OAG had appointed to act as special counsel to collect debts owed to the State of Ohio did not offend Fair Debt Collection Practices Act's (FDCPA) prohibition against using name other than their "true name," where letters accurately identified OAG as entity primarily responsible for collection of debt, described special counsel's affiliation with OAG, and provided special counsel's address, to which debtors were to send payment. Fair Debt Collection Practices Act, § 807(e)(14), 15 U.S.C.A. § 1692e(e)(14); R.C. §§ 109.08, 131.02(A, C, F). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

Under the Fair Debt Collection Practices Act's (FDCPA), a debt collector may not lie about its institutional affiliation. Fair Debt Collection Practices Act, § 807(e)(14), 15 U.S.C.A. § 1692e(e)(14). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

Debt collection letters that failed to disclose that lawsuit seeking payment of debt was time-barred were false, misleading, or deceptive, in violation of Fair Debt Collection Practices Act (FDCPA), even though there was no specific settlement offer that would discount debt, where letters were rife with characterization of soon-to-expire special deal or offer, there were no details offered to explain very special offer, and letters hinted at additional collection efforts if consumer did not pay debt. Consumer Credit Protection Act § 807, 15 U.S.C.A. §§ 1692e(2), 1692e(10). Manuel v. Merchants and Professional Bureau, Incorporated, 956 F.3d 822 (5th Cir. 2020).

If a debt collector seeks fees to which it is not entitled, it has committed a prima facie violation of the FDCPA, even if there was no clear prior judicial statement that it was not entitled to collect the fees. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Wise v. Zwicker & Associates, P.C., 780 F.3d 710 (6th Cir. 2015).

Debt collector's use of words in disclosure statement in collection letter, that it will not, sue consumer, rather than cannot, sue, for non-payment debt that, due to its age, was past time in which law would allow collector to sue, was not false, misleading, or deceptive in violation of the Fair Debt Collection Practices Act (FDCPA), where statement used basic language informing consumer that collector would not sue based on the age of the debt, and will not language was consented to by regulatory bodies with enforcement authority over FDCPA. Consumer Credit Protection Act §§ 605, 807, 15 U.S.C.A. §§ 1681c, 1692e. Goodman v. Asset Acceptance LLC, 428 F. Supp. 3d 526 (D. Colo. 2019).

Debtor sufficiently alleged that reinstatement letter was misleading and unfair attempt to collect unauthorized fees, so as to state claim against debt collectors for violation of Fair Debt Collection Practices Act (FDCPA); debtor alleged that letter falsely represented true character of charges under corporate advances category and, as a result, impaired his ability to determine validity of amounts alleged to be owed. Consumer Credit Protection Act §§ 807, 808, 15 U.S.C.A. §§ 1692e, 1692f. Meyer v. Fay Servicing, LLC, 385 F. Supp. 3d 1235 (M.D. Fla. 2019).

Consumer Financial Protection Bureau (CFPB) stated a claim for violation of the section of the Consumer Financial Protection Act (CFPA) prohibiting any unfair, deceptive, or abusive act or practice by alleging that "creditors' rights" law firm prepared and filed thousands of debt collection lawsuits against consumers without meaningful attorney involvement, and that firm's "litigation-mill" practice misled consumers acting reasonably under the circumstances that a lawyer had reviewed the consumer's file and determined that it validly merited litigation. Consumer Financial Protection Act of 2010, § 1036(a)(1)(B), 12 U.S.C.A. § 5536(a)(1)(B). Consumer Financial Protection Bureau v. Frederick J. Hanna & Associates, P.C., 114 F. Supp. 3d 1342 (N.D. Ga. 2015).

Disclaimer in debt collection letter, stating that collector would not, instead of could not enforce consumer's time-barred debt in court, would not have been misleading or confusing to the least sophisticated consumer, and therefore did not misrepresent the legal status of consumer's debt in violation of Fair Debt Collection Practices Act (FDCPA); there was no risk of revival based on partial payment, and letter did not falsely state or indirectly suggest that collector had ability to sue on the time-barred debt, but rather, expressly informed consumer that the law limited how long a person could be sued on a debt and that due to age of his debt, collector would not sue him, which could not be taken as veiled message telling consumer that debt was not

time barred or that litigation could be forthcoming, if collector so chose. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(2)(A); Nev. Rev. St. § 11.200. Stimpson v. Midland Credit Management, Inc., 347 F. Supp. 3d 538 (D. Idaho 2018).

A proof of claim filed in a bankruptcy proceeding is an action to collect a debt, for purposes of FDCPA provision prohibiting a debt collector from using false, deceptive, or misleading representation or means in connection with collection of any debt. Fair Debt Collection Practices Act, § 807, 15 U.S.C.A. § 1692e. Donaldson v. LVNV Funding, LLC, 97 F. Supp. 3d 1033 (S.D. Ind. 2015).

Collection letter did not violate Fair Debt Collection Practices Act (FDCPA) prohibition on abusive, deceptive, and unfair debt collection practices by disclosing certain rights under Massachusetts state law but not full extent of consumer's right to stop debt collection calls under FDCPA; letter included notices informing consumer that state law required certain disclosures and that letter did not contain complete list of rights consumer had under state and federal law, and therefore least sophisticated consumer would not have been misled into believing that letter explained full extent of consumer's rights. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e; 940 Mass. Code Regs. 7.04(h). Rocha v. Zwicker & Associates, P.C., 474 F. Supp. 3d 388 (D. Mass. 2020).

A debt collector will not be held liable under the Fair Debt Collection Practices Act (FDCPA) based on an individual consumer's chimerical or farfetched reading of a collection letter. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. Marti v. Schreiber/Cohen, LLC, 454 F. Supp. 3d 122 (D. Mass. 2020).

Debtor sufficiently alleged that collection letters sent by agency, which was hired by debt buyer to pursue collection, were misleading or deceptive, so as to state claim for violation of Fair Debt Collection Practices Act (FDCPA); collection letter stated that agency was not obligated to accept any payment proposal and asked consumer to call to discuss potential settlement options, and debtor alleged that unsophisticated consumers could have been misled into thinking agency could legally enforce debt, which was time-barred. Consumer Credit Protection Act, § 807, 15 U.S.C.A. § 1692e. Norman v. Allied Interstate, LLC, 310 F. Supp. 3d 509 (E.D. Pa. 2018).

Bank account owner, who alleged that law firm served garnishment order on his bank, and that bank placed hold on his account, even though name on garnishment order and name on his account did not match, and that law firm failed to take action to have hold removed, failed to allege that law firm took any further action to pursue collection of debt against bank account owner after discovering that name on bank account and name of state-court default judgment that gave rise to garnishment order did not match, or made any other affirmative misrepresentation or act, and thus bank account owner did not state cause of action for violation of the Fair Debt Collection Practices Act (FDCPA) based on false, deceptive, or misleading representation or means in connection with collection of any debt. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Alvarado Martinez v. Eltman Law, P.C., 444 F. Supp. 3d 748 (N.D. Tex. 2020).

Medical debt collector violated the Fair Debt Collection Practices Act (FDCPA) by making false representations about the character, amount, or legal status of patient's debt, where debt collector attempted to collect debt from patient, but patient's employer, rather than patient, owed debt pursuant to Utah's Workers Compensation Act. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(2)(A); Utah Code Ann. § 34A-2-401(2)(b). Young v. NPAS, Inc., 361 F. Supp. 3d 1171 (D. Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 Bourff v. Rubin Lublin, LLC, 674 F.3d 1238 (11th Cir. 2012).

2 15 U.S.C.A. § 1692e(1).

3 15 U.S.C.A. § 1692e(2).
Although not aimed specifically at efforts to collect debts that have been discharged in bankruptcy, the FDCPA provision prohibiting a debt collector from making a false representation of the character, amount, or legal status of any debt fits that practice to a "T." Ross v. RJM Acquisitions Funding LLC, 480 F.3d 493 (7th Cir. 2007).

4 15 U.S.C.A. § 1692e(3).

5 15 U.S.C.A. § 1692e(4).

6 15 U.S.C.A. § 1692e(6).

7 15 U.S.C.A. § 1692e(7).

8 15 U.S.C.A. § 1692e(12).

9 15 U.S.C.A. § 1692e(13).

10 15 U.S.C.A. § 1692e(14).

11 15 U.S.C.A. § 1692e(15).

12 15 U.S.C.A. § 1692e(16).

13 Huertas v. Galaxy Asset Management, 641 F.3d 28 (3d Cir. 2011).

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American Jurisprudence, Second Edition | May 2021 Update

Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

2. False, Deceptive, or Misleading Representations or Means

§ 184. Threats

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

The threat to take any action that cannot legally be taken or that is not intended to be taken constitutes a prohibited false, deceptive, or misleading representation or means in connection with the collection of debt.[1] Further, threatening to communicate to any person credit information which is known or which should be known to be false constitutes a prohibited false, deceptive, or misleading representation or means in connection with the collection of debt under the Fair Debt Collection Practices Act (FDCPA).[2] Threats to take legal action or to report a debtor to credit agencies are not actionable under the FDCPA unless the action threatened cannot legally be taken, is not intended to be taken, or involves the communication of false information.[3] A debt collector does not have an affirmative duty to notify credit reporting agencies (CRA) that a consumer disputes the debt unless the debt collector knows of the dispute and elects to report to a CRA.[4]

Debt-collection notices violated the FDCPA by threatening legal action when the debt collectors did not intend to file suit as statements that the accounts would be transferred to an attorney if unpaid by a deadline and that the debtor's attorney would want to be paid had the effect of threatening litigation even though the collectors knew that neither the creditor nor the creditor's attorney would file lawsuits against the debtors.[5] A debt collection letter, indicating that it was "our intent to pursue collection of this debt through every means available," did not contain a threat that could not be made or was not intended to be carried out in violation of the FDCPA; when the letter was drafted, the debt collector had not firmly decided what steps, if any, it would take to collect the unpaid debt but was considering the full range of options.[6]

The "least-sophisticated debtor" standard applies to an allegation that the debt collector made a threat to take any action that could not legally be taken.[7]

CUMULATIVE SUPPLEMENT

Cases:

An unsophisticated consumer would not have thought that including PROFESSIONAL DEBT COLLECTORS and CCB in a debt collection letter was false, deceptive, or misleading in violation of Fair Debt Collection Practices Act (FDCPA); an unsophisticated consumer would have understood that PROFESSIONAL DEBT COLLECTORS and CCB respectively described and referenced debt collector, that CCB was a commonsense abbreviation of Credit Collections Bureau, which was the debt collector's other registered name and the name it used in its debt collection letter to consumer, and letter provided correct registered name, phone number, website, balance due, and a name and phone number for assigned collector. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692. Klein v. Credico Inc., 922 F.3d 393 (8th Cir. 2019).

Loan servicer's demand letter did not include threat to take any action that could not legally be taken or that was not intended to be taken, in alleged violation of Fair Debt Collection Practices Act (FDCPA), based on mortgagors' assertion that letter stated that servicer could initiate foreclosure proceedings without further notice if default was not cured by designated date; demand letter said that foreclosure proceedings would not be commenced "unless and until allowed by applicable law," which indicated that it would not initiate foreclosure proceedings contrary to mortgage agreement, which required servicer to give notice prior to acceleration of debt. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(5). Moore v. Seterus, Inc., 711 Fed. Appx. 575 (11th Cir. 2017).

Effort to seek a voluntary payment by the debtor, without more, does not constitute a threat of litigation, for purposes of Fair Debt Collection Practices Act (FDCPA). Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. Woodward v. Collection Consultants of California, 381 F. Supp. 3d 1234 (C.D. Cal. 2019).

No threat of litigation needs to be made for a debt collection letter to violate the Fair Debt Collection Practices Act (FDCPA). Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e. Manuel v. Merchants and Professional Credit Bureau, Inc., 402 F. Supp. 3d 361 (W.D. Tex. 2019).

Consumer did not establish that creditor used false, deceptive, or misleading representation to collect a $25.16 debt by sending letter that threatened to file a lawsuit to collect debt, in violation of provision of the Fair Debt Collection Practices Act (FDCPA), since the phrase in the letter stating, "certainly, you can see the benefit of settling this dispute in an amicable manner," would not lead the least sophisticated consumer to believe that his failure to settle a $25.16 debt would cause the debt collector to file suit against him. Consumer Credit Protection Act § 809, 15 U.S.C.A. § 1692g(a)(5). Nitzkin v. Craig, 324 Mich. App. 675, 922 N.W.2d 676 (2018).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692e(5).

2 15 U.S.C.A. § 1692e(8).

3 Whayne v. U.S. Dept. of Educ., 915 F. Supp. 1143, 107 Ed. Law Rep. 678 (D. Kan. 1996).

4 Llewellyn v. Allstate Home Loans, Inc., 711 F.3d 1173 (10th Cir. 2013).

5 United States v. National Financial Services, Inc., 98 F.3d 131 (4th Cir. 1996).

6 Spira v. Ashwood Financial, Inc., 358 F. Supp. 2d 150 (E.D. N.Y. 2005).

7 Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222 (9th Cir. 1988); Abels v. JBC Legal Group, P.C., 428 F. Supp. 2d 1023 (N.D. Cal. 2005).
As to the least sophisticated debtor standard, see § 182.

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Consumer and Borrower Protection

Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

III. Debt Collection Practices

C. Prohibited, Permitted, or Required Practices

2. False, Deceptive, or Misleading Representations or Means

§ 185. False communications

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

Communicating to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed, constitutes a prohibited false, deceptive, or misleading representation or means in connection with the collection of debt under the Fair Debt Collection Practices Act (FDCPA)[1] as does the use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any state, or which creates a false impression as to its source, authorization, or approval.[2]

CUMULATIVE SUPPLEMENT

Cases:

When sending debt collection letters, use of Ohio Attorney General's (OAG) letterhead at OAG's direction by attorneys and law offices that OAG had appointed to act as special counsel to collect debts owed to the State of Ohio did not offend Fair Debt Collection Practices Act's (FDCPA) specific prohibition against falsely representing that communication was authorized, issued, or approved by state, where OAG required special counsel to use letterhead, such use merely conveyed on whose authority special counsel wrote to debtor, and letters alerted debtors to basis for payment obligation and official responsible for enforcement of debts owed to state while signature block conveyed who OAG had engaged to collect debt. Fair Debt Collection Practices Act, § 807(e)(9), 15 U.S.C.A. § 1692e(e)(9); R.C. §§ 109.08, 131.02(A, C, F). Sheriff v. Gillie, 136 S. Ct. 1594 (2016).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692e(8).
This provision does not impose a writing requirement on consumers who wish to dispute a debt. Brady v. Credit Recovery Co., Inc., 160 F.3d 64 (1st Cir. 1998).

2 15 U.S.C.A. § 1692e(9).

17 Am. Jur. 2d Consumer Protection § 186

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2. False, Deceptive, or Misleading Representations or Means

§ 186. Use of false communication to collect debt or obtain information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

Under the Fair Debt Collection Practices Act (FDCPA), the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer is prohibited.[1] A literally true statement can still be misleading. In determining whether a debt collection letter is "deceptive," courts are not to read the language from the perspective of a savvy consumer, and consumers are under no obligation to seek explanation of confusing or misleading language in debt collection letters. When language in a debt collection letter can reasonably be interpreted to imply that the debt collector will take action it has no intention or ability to undertake, the debt collector that fails to clarify that ambiguity does so at its peril.[2] Conditional language, particularly in the absence of any language clarifying or explaining the conditions, does not insulate a debt collector from liability for the use of any false representation or deceptive means to collect any debt.[3]

Under the FDCPA, there is nothing improper about making a settlement offer; forbidding them would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance efforts to resolve the debt, which is something that is clearly at odds with the language and purpose of the FDCPA.[4] A debt collector's settlement offer communicated directly to the consumer does not violate the FDCPA prohibition against deceptive communications, i.e., does not raise the possibility that the unsophisticated consumer will think that failure to pay by the offer's deadline means no further chance to settle the debt for less than the full amount, if the debt collector includes with the offer a statement that "we are not obligated to renew this offer"; however, absence of the safe harbor language does not render the debt collector per se liable.[5]

CUMULATIVE SUPPLEMENT

Cases:

Mortgagor stated plausible claim against mortgagee and mortgage servicer that loan modification offer letter was false, deceptive, or misleading, in violation of Fair Debt Collection Practices Act (FDCPA), despite defendants' assertions that letter did not expressly promise to keep offer open for 60 days and contained provision that offer would not apply if foreclosure sale was scheduled for date within 38 days after application was received; letter stated that mortgagor qualified for loan modification, that to accept offer, mortgagor had to submit monthly income and expense information, and that if defendants did not hear from mortgagor within 60 days of offer, he still may be eligible for modification, but that new valuation would be required, it was reasonable for mortgagor to read letter as offer that gave him 60 days to submit application, and that if he did not do so within 60 days, he could still seek modification with updated valuation, and if 38-day foreclosure deadline applied, it was impossible for mortgagor to meet it, given that date that mortgagor received notice of foreclosure sale was three days before offer letter was sent. Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692. Weiner v. Rushmore Loan Management Services, LLC, 327 F. Supp. 3d 268 (D. Mass. 2018).

Borrowers sufficiently alleged that letters from non-attorney on law firm's letterhead seeking to collect mortgage debt were misleading, so as to state claim against law firm that handled mortgage foreclosures for violations of Fair Debt Collection Practices Act (FDCPA) and Michigan's Regulation of Collection Practices Act (RCPA); borrowers alleged that letters were misleading because they were computer generated, mass produced, and sent to consumers without meaningful attorney involvement, and borrowers contended that use of firm's letterhead was deceptive because letters would lead reasonable consumer to false impression that they were from attorney, when in fact they were generated and sent by administrative personnel not engaged in practice of law. Consumer Credit Protection Act § 807, 15 U.S.C.A. § 1692e(3); Mich. Comp. Laws Ann. § 445.252(a). Thompke v. Fabrizio & Brook, P.C., 261 F. Supp. 3d 798 (E.D. Mich. 2017).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692e(10).

2 Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).

3 Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).

4 Campuzano-Burgos v. Midland Credit Management, Inc., 550 F.3d 294 (3d Cir. 2008).

5 Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769 (7th Cir. 2007).

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2. False, Deceptive, or Misleading Representations or Means

§ 187. Failure to provide required information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 214

Except for a formal pleading made in connection with a legal action, the failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector constitute a violation of the Fair Debt Collection Practices Act.[1]

Materiality is not an element of an FDCPA claim about a debt collector's conduct that involves "failure to disclose" "that the communication" is "from a debt collector" since debt collectors are required to disclose their status in every communication with a consumer.[2]

CUMULATIVE SUPPLEMENT

Cases:

Debtor sufficiently alleged that debt collector failed to disclose or meaningfully convey name of current creditor to whom debtor owed debt, so as to state claim for violation of Fair Debt Collection Practices Act (FDCPA); debtor alleged that debt collection letter listed medical office twice, once as original creditor and again with no label, and that use of words original

creditor suggested that medical office was no longer current creditor. Consumer Credit Protection Act § 809, 15 U.S.C.A. § 1692g(a)(2). Kirkpatrick v. TJ Services, Inc., 379 F. Supp. 3d 539 (E.D. Va. 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692e(11).

2 Warren v. Sessoms & Rogers, P.A., 676 F.3d 365 (4th Cir. 2012), as amended, (Feb. 1, 2012).

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Research References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 212, 216, 291, 304, 388 to 393
West's Key Number Digest, Damages 57.40, 57.49
West's Key Number Digest, Federal Civil Procedure 2494.5

A.L.R. Library

A.L.R. Index, Fair Debt Collection Practices Act
West's A.L.R. Digest, Antitrust and Trade Regulation 212, 216, 291, 304, 388 to 393
West's A.L.R. Digest, Damages 57.40, 57.49
West's A.L.R. Digest, Federal Civil Procedure 2494.5

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§ 188. Administrative enforcement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 304

Treatises and Practice Aids

As to fair credit reporting proceedings, in general, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA) is enforced by the Federal Trade Commission (FTC) except where the function is specifically committed to another agency.[1] For the purposes of the exercise by the FTC of its functions and powers under the Federal Trade Commission Act,[2] a violation of the FDCPA is deemed an unfair or deceptive act or practice in violation of that

Act.[3] All of the functions and powers of the FTC are available to it to enforce compliance, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act.[4]

The FDCPA specifies those federal officers, agencies, and boards, other than the FTC, which, subject to subtitle B of the Consumer Financial Protection Act of 2010, are required to enforce the FDCPA and the federal statutes under which they are to enforce compliance.[5] For the purpose of the exercise by any such agency of its powers under the statutes pertaining to it, a violation of any requirement imposed under the FDCPA is deemed to be a violation of a requirement imposed under such statutes.[6]

Though the FTC is empowered to enforce the FDCPA, Congress encouraged private enforcement by permitting aggrieved individuals to bring suit as private attorneys general.[7]

CUMULATIVE SUPPLEMENT

Cases:

Despite the importance of private enforcement of California's unfair competition law (UCL) and false advertising law (FAL), such private suits do not and cannot substitute for public enforcement actions, which serve as a far greater deterrent and thus a greater protection. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500. California v. IntelliGender, LLC, 771 F.3d 1169 (9th Cir. 2014).

The Truth in Savings Act (TISA) does not provide a private right of action to enforce its provisions. 12 U.S.C. § 4309. Vathana v. EverBank, 770 F.3d 1272 (9th Cir. 2014).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692*l*(a).

2 15 U.S.C.A. §§ 41 et seq.
As to the Federal Trade Commission Act, generally, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1104 to 1231.

3 15 U.S.C.A. § 1692*l*(a).
As to unfair trade practices under the Federal Trade Commission Act, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1106 to 1118.

4 15 U.S.C.A. § 1692*l*(a).
As to the functions and powers of the Federal Trade Commission, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1168 to 1172.

5 15 U.S.C.A. § 1692*l*(b).

6 15 U.S.C.A. § 1692*l*(c).

7 Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).
As to civil liability, see § 189.

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§ 189. Civil liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 212, 291
West's Key Number Digest, Damages 57.40, 57.49
West's Key Number Digest, Federal Civil Procedure 2494.5

A.L.R. Library

Satisfaction of Commonality Requirement for Class Actions Under Fair Debt Collection Practices Act, 15 U.S.C.A. ss1692 et seq., 54 A.L.R. Fed. 2d 479
Satisfaction of Superiority Requirement for Class Actions Under Fair Debt Collection Practices Act, 15 U.S.C.A. ss 1692 et seq., 51 A.L.R. Fed. 2d 1
Award of attorneys' fees under sec. 813(a)(3) of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692k(a)(3)), 132 A.L.R. Fed. 477

Treatises and Practice Aids

As to Fair Debt Collection proceedings; civil liability, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1
Action for Harassment of Debtor, 16 Am. Jur. Trials 619
Collection Practice, 12 Am. Jur. Trials 193
Cause of Action for Violation of Fair Debt Collection Practices Act [15 U.S.C.A. §§ 1692-1692*o*], 29 Causes of Action 2d 1

A debt collector may be subject to civil liability under the Fair Debt Collection Practices Act (FDCPA).[1]

Equitable relief,[2] including declaratory[3] and injunctive relief,[4] is not available to an individual under this provision. The FDCPA does not permit private litigants to seek injunctive or declaratory relief that has the effect of canceling or extinguishing a debt as a remedy for FDCPA violations; the FDCPA's structure implies that only the Federal Trade Commission (FTC) is permitted to seek injunctive relief, and nothing in the FDCPA suggests that a debtor may seek a declaratory judgment canceling or extinguishing a debt in lieu of damages.[5]

No liability applies to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau of Consumer Financial Protection, notwithstanding that after such act or omission has occurred, the opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[6]

The FDCPA's private-enforcement provision authorizes any aggrieved person to recover damages from "any debt collector who fails to comply with any provision" of the FDCPA.[7] Each provision of the FDCPA must be analyzed individually to determine who falls within the scope of its protection and thus to decide with respect to whom the provision can be violated.[8]

An action under the FDCPA may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.[9]

CUMULATIVE SUPPLEMENT

Cases:

Fair Debt Collection Practices Act (FDCPA) authorizes private lawsuits and weighty fines designed to deter wayward collection practices. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).

Proofs of claims filed by debt collector in consumer's bankruptcy proceeding on debts for which statute of limitations had expired were statements made to a consumer, so as to confer standing on consumer to bring claim for violation of the Fair Debt Collection Practices Act (FDCPA); consumer was a real party in interest to the bankruptcy proceeding, since it was filed

pursuant to Chapter 13 of the Bankruptcy Code. 11 U.S.C.A. § 1301 et seq.; Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.; West's A.I.C. 34–11–2–7. Donaldson v. LVNV Funding, LLC, 97 F. Supp. 3d 1033 (S.D. Ind. 2015).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692k.

2 Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830, 34 Fed. R. Serv. 2d 208 (11th Cir. 1982).

3 Bradshaw v. Hilco Receivables, LLC, 765 F. Supp. 2d 719 (D. Md. 2011).

4 Zanni v. Lippold, 119 F.R.D. 32 (C.D. Ill. 1988); Bradshaw v. Hilco Receivables, LLC, 765 F. Supp. 2d 719 (D. Md. 2011).

5 Vitullo v. Mancini, 684 F. Supp. 2d 760 (E.D. Va. 2010).

6 15 U.S.C.A. § 1692k(e).

7 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013).

8 Todd v. Collecto, Inc., 731 F.3d 734 (7th Cir. 2013).

9 15 U.S.C.A. § 1692k(d).

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§ 190. Amount of damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 388 to 393
West's Key Number Digest, Damages 57.40, 57.49

A.L.R. Library

Award of attorneys' fees under sec. 813(a)(3) of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692k(a)(3)), 132 A.L.R. Fed. 477

Treatises and Practice Aids

As to Fair Debt Collection proceedings; civil liability damages, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

A debt collector who fails to comply with any provision of the FDCPA with respect to any person is liable to such person for any actual damage sustained by such person as a result of such failure.[1] An award of actual damages for emotional distress has been allowed.[2] A debtor is not entitled to actual damages under this provision where there is no pleading or proof of any specific loss.[3]

Further, in the case of any action by an individual, the debt collector is liable for such additional damages as the court may allow but not exceeding $1,000.[4] This provision limits a plaintiff's additional damages, beyond actual damages, to $1,000 "per proceeding" or "per action," rather than "per violation."[5]

Practice Tip:

Proof of injury is not required when the only damages sought are statutory damages.[6]

Provision is made for the amount of recovery in a class action, not to exceed the lesser of $500,000 or 1% of the net worth of the debt collector.[7] The term “net worth” refers to the debt collector's book value net worth, or balance sheet net worth, rather than its fair market net worth and thus does not include the debt collector's goodwill.[8]

Punitive damages are not available under the FDCPA.[9]

In addition, the court in a successful action to enforce such liability may award the costs of the action together with reasonable attorney's fees as determined by the court.[10]

Under the section of the FDCPA governing awards of attorney's fees and costs, when the plaintiff brings an action in bad faith, the court may award attorney's fees to the defendant.[11] On a finding by the court that an action brought under the statute was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.[12] The costs provision of the FDCPA is not "contrary" to the Federal Rule of Civil Procedure governing awards of costs and thus does not displace a district court's discretion to award costs to a prevailing party under the rule, and so a district court may award costs to prevailing defendants in FDCPA cases without finding that the plaintiff brought the case in bad faith and for the purpose of harassment.[13] District courts may appropriately consider the plaintiff's indigency in deciding whether to award costs.[14]

CUMULATIVE SUPPLEMENT

Cases:

District Court did not abuse its discretion by applying across-the-board 20 percent reduction in attorney's hourly rate when awarding attorney fees in part to borrower in action against lender, alleging violations of Fair Debt Collection Practices Act (FDCPA), the Real Estate Settlement Procedures Act (RESPA), and Truth in Lending Act (TILA); borrower's team of attorneys and paralegals claimed substantial increase in billing rates from course of litigation to those claimed when filing motion for attorney fees, Court found billing rate was not reasonable for attorneys' and paralegals' experience and geographic location, it based its award on rates borrower's counsel customarily charged, based on billing records it sent to lender, and action was not the first in which the Court had raised similar concerns regarding paralegals at firm. Real Estate Settlement Procedures Act of 1974 § 2, 12 U.S.C.A. § 2601 et seq.; Consumer Credit Protection Act § 802, 15 U.S.C.A. § 1692 et seq.; Truth in Lending Act § 102, 15 U.S.C.A. § 1601 et seq. Richard v. Caliber Home Loans, Inc., 832 Fed. Appx. 940 (6th Cir. 2020).

Under the Fair Debt Collection Practices Act (FDCPA), a debt collector that persuades a court that a sequential suit was brought to harass not only avoids an award of attorney fees, but also becomes eligible to collect its own attorney fees from the debtor. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(a)(3). Horia v. Nationwide Credit & Collection, Inc., 944 F.3d 970 (7th Cir. 2019).

Because Congress chose to define attorney fees separately from costs in the Fair Debt Collection Practices Act (FDCPA), consumer who rejected debt collector's offers to settle but won at trial on his FDCPA claim would be entitled to reasonable attorney fees, by operation of the FDCPA, without regard to the more general limitation on costs in the rule governing offers of judgment. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(a)(3); Fed. R. Civ. P. 68. Paz v. Portfolio Recovery Associates, LLC, 924 F.3d 949 (7th Cir. 2019).

Debtor who prevailed at trial on Fair Debt Collection Practices Act (FDCPA) claim that should not have reached trial was not entitled to award of attorney's fees or costs against creditor's law firm. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(a)(3). Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 900 F.3d 377 (7th Cir. 2018).

District court did not abuse its discretion by awarding debtor damages for emotional distress, in action against debt collector for violation of Fair Debt Collection Practices Act; affidavits filed by debtor supported magistrate judge's finding that debtor suffered considerable stress and aggravation on regular basis as a result of debt collector's violations of Act. Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq. Carlisle v. National Commercial Services, Inc., 722 Fed. Appx. 864 (11th Cir. 2018).

An injured person's testimony alone may suffice to establish damages for emotional distress under Fair Debt Collection Practices Act (FDCPA), provided that he reasonably and sufficiently explains the circumstances surrounding the injury and does not rely on mere conclusory statements. 15 U.S.C.A. § 1692k(a)(1). Villanueva v. Account Discovery Systems, LLC, 77 F. Supp. 3d 1058 (D. Colo. 2015).

When determining attorney fees under the Fair Debt Collection Practices Act (FDCPA), a district court should consider the rate a reasonable, paying client would pay, and use that rate to calculate the presumptively reasonable fee. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(a)(3). Garcia v. Law Offices Howard Lee Schiff, P.C., 401 F. Supp. 3d 241 (D. Conn. 2019).

Under Florida law, consumer's allegations that debt collector lacked written procedures regarding handling of erroneous debt collection and credit furnishing processes and did not know whether consumer had opened or paid off credit accounts were sufficient to support finding of malicious intent required to establish claim for punitive damages under Florida Consumer Collection Practices Act (FCCPA). West's F.S.A. § 559.55 et seq. Arianas v. LVNV Funding LLC, 307 F.R.D. 615 (M.D. Fla. 2015).

In awarding attorneys' fees under Fair Debt Collection Practices Act (FDCPA) to prevailing consumer, $327 hourly rate, not $372 hourly rate requested by consumer, was reasonable rate for attorney; case had been simple, involving single FDCPA-

violative sentence in single letter from debt collector, and prior decisions in district had awarded attorney $300, $327, and $352 hourly rates in FDCPA cases. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k(a)(3). Cooper v. Retrieval-Masters Creditors Bureau, Inc., 338 F. Supp. 3d 729 (N.D. Ill. 2018).

Consumer failed to adequately plead that she suffered injury in fact and, thus, did not have standing to bring action against debt collector for violation of Fair Debt Collection Practices Act (FDCPA), although complaint alleged that because debt collector violated various provisions of FDCPA by failing to list her account as disputed by consumer, she had been damaged; consumer did not specify any concrete harm suffered as a result of debt collector's collection efforts, and merely stating that she had been damaged was conclusory statement that made no factual allegation of any actual harm or any risk of real harm in future. Consumer Credit Protection Act § 802 et seq., 15 U.S.C.A. § 1692 et seq. Piper v. Meade & Associates, Inc., 282 F. Supp. 3d 905 (D. Md. 2017).

Attorney would be liable, in lawsuit alleging violations of the Mortgage Assistance Relief Services (MARS) Rule, for civil penalties not to exceed $5,000.00 a day for the period during which the MARS Rule violations occurred, and would be assessed $18,477.50, an amount equal to the restitution he had been ordered to pay; although there was no evidence of the attorney's financial resources, considerable evidence of his good or bad faith was lacking, attorney associated with several individuals who knew or should have known of the likelihood that states, or the United States, would regulate mortgage assistance relief services, and although there was no evidence suggesting that attorney might have learned through those individuals of the risks that his firm took such that he would be on notice of rules like the MARS Rule, such that District Court could not comfortably impute the notice that others had to him to determine with what mental state he acted, the gravity of his actions was not de minimis, inasmuch as he wrote and entered the improper attorney-client fee agreements and participated in providing the mortgage assistance relief services. 12 U.S.C.A. § 5565(c)(3). New Mexico ex rel. Balderas v. Real Estate Law Center, P.C., 430 F. Supp. 3d 761 (D.N.M. 2019).

Gravity of violations, consumers' losses, history of previous violations, and justice all weighed in favor of imposing substantial civil penalties, allocating bulk of penalties to former provider of mortgage relief services and its principals, in Consumer Financial Protection Bureau's civil enforcement action, under Consumer Financial Protection Act of 2010, against former providers and principals; principals based entire business model on bait and switch practices while attempting to claim statutory exemption for provision of legal services, providers collected millions of dollars in advance fees from consumers, most consumers received no modification or legal representation, which they might have obtained for free, and principals had long histories of dubious debt relief services. 12 U.S.C.A. § 5565(c)(3); 12 C.F.R. §§ 1015.3(b)(9); 1015.4(b)(1) and (4); 1015.5(a). Consumer Financial Protection Bureau v. Mortgage Law Group, LLP, 420 F. Supp. 3d 848 (W.D. Wis. 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1692k(a)(1).
Debt collectors that violate the FDCPA are strictly liable, meaning that a consumer need not show intentional conduct by the debt collector to be entitled to damages. Easterling v. Collecto, Inc., 692 F.3d 229 (2d Cir. 2012).

2 Carrigan v. Central Adjustment Bureau, Inc., 502 F. Supp. 468 (N.D. Ga. 1980); Teng v. Metropolitan Retail Recovery Inc., 851 F. Supp. 61 (E.D. N.Y. 1994).

3 Emanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989).

4 15 U.S.C.A. § 1692k(a)(2)(A).

5 Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647, 1994 FED App. 0125P (6th Cir. 1994); Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992).

6 Phillips v. Asset Acceptance, LLC, 736 F.3d 1076, 87 Fed. R. Serv. 3d 287 (7th Cir. 2013).

7 15 U.S.C.A. § 1692k(a)(2)(B).

8 Sanders v. Jackson, 209 F.3d 998, 178 A.L.R. Fed. 649 (7th Cir. 2000).

9 Desmond v. Phillips & Cohen Associates, Ltd., 724 F. Supp. 2d 562 (W.D. Pa. 2010).

10 15 U.S.C.A. § 1692k(a)(3).

11 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013).

12 15 U.S.C.A. § 1692k(a)(3).

13 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013), referring to Fed. R. Civ. P. 54.

14 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013).

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D. Enforcement and Liability

§ 191. Factors considered by court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 388 to 393
West's Key Number Digest, Damages 57.40, 57.49

A.L.R. Library

Award of attorneys' fees under sec. 813(a)(3) of Fair Debt Collection Practices Act (15 U.S.C.A. sec. 1692k(a)(3)), 132 A.L.R. Fed. 477

Treatises and Practice Aids

As to Fair Debt Collection proceedings; civil liability damages, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

In determining the amount of liability under the Fair Debt Collection Practices Act (FDCPA), the court is required to consider relevant factors, including those designated in the statute.[1] The factors mentioned in the statute are: (1) in any individual action, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;[2] or (2) in any class action, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.[3]

Footnotes

1 15 U.S.C.A. § 1692k(b).

2 15 U.S.C.A. § 1692k(b)(1).

3 15 U.S.C.A. § 1692k(b)(2).

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§ 192. Intent and bona fide error

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 216

A.L.R. Library

Construction and Application of Fair Debt Collection Practices Act (FDCPA) Bona Fide Error Defense, 15 U.S.C.A. s1692k(c), 14 A.L.R. Fed. 2d 207

Treatises and Practice Aids

As to evidence; burden of proof, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Proof Under the Fair Debt Collection Practices Act, 104 Am. Jur. Proof of Facts 3d 1

The Fair Debt Collection Practices Act (FDCPA) is generally characterized as a strict liability statute because it imposes liability without proof of an intentional violation.[1] However, a debt collector may not be held liable under the FDCPA if he or she shows by a preponderance of evidence that the violation was not intentional and resulted from bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error.[2] Reliance on the advice of counsel is not included in the unintentional-and-bona fide-error defense of this provision.[3] Also, the bona fide error defense does not protect a debt collector whose reliance on a creditor's representation is unreasonable.[4] The bona fide error defense does not apply to mistake of law, that is, a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the legal requirements of the Act.[5] Instead, it refers only to measures designed to avoid errors like clerical or factual mistakes.[6]

Absent the existence of procedures reasonably adapted to avoid errors, a debt collector cannot establish that its actions fall under the bona fide-error exception to the FDCPA.[7] The word "reasonable" in the "bona fide error" defense provision, cannot be equated to "state of the art," which is to say, at the technological frontier.[8]

The intent prong of the bona fide error defense requires the debt collector to show that his or her violation of the FDCPA was unintentional, not that the underlying act itself was unintentional.[9]

The procedures component of the bona fide error defense in an FDCPA action involves a two-step, fact intensive inquiry into whether (1) the debt collector "maintained," i.e., actually employed or implemented, procedures to avoid errors, and (2) the procedures were reasonably adapted to avoid the specific error at issue.[10]

Practice Tip:

The bona fide-error exception is an affirmative defense for which a debt collector has the burden of proof at trial.[11]

CUMULATIVE SUPPLEMENT

Cases:

District Court would prohibit defendant debt collectors from raising bona fide error defense under Fair Debt Collection Practices Act (FDCPA) based on any claimed process for avoiding such error not disclosed to plaintiff consumers in FDCPA action, where collectors did not meaningfully argue that they had procedures reasonably adapted to avoid the errors, and Court was satisfied that ruling in consumers' favor would best avoid confusing jury and unnecessarily lengthening trial. Consumer Credit Protection Act § 813, 15 U.S.C.A. § 1692k; Fed. R. Civ. P. 37(C)(1). Verburg v. Weltman, Weinberg & Reis Co., L.P.A., 295 F. Supp. 3d 771 (W.D. Mich. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Glover v. F.D.I.C., 698 F.3d 139, 83 Fed. R. Serv. 3d 481 (3d Cir. 2012); Warren v. Sessoms & Rogers, P.A., 676 F.3d 365 (4th Cir. 2012), as amended, (Feb. 1, 2012); Gonzales v. Arrow Financial Services, LLC, 660 F.3d 1055 (9th Cir. 2011).

2 15 U.S.C.A. § 1692k(c).

3 Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984).

4 McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939 (9th Cir. 2011).

5 Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010); Owen v. I.C. System, Inc., 629 F.3d 1263 (11th Cir. 2011).

6 Owen v. I.C. System, Inc., 629 F.3d 1263 (11th Cir. 2011).

7 Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994).

8 Ross v. RJM Acquisitions Funding LLC, 480 F.3d 493 (7th Cir. 2007).

9 Johnson v. Riddle, 443 F.3d 723 (10th Cir. 2006).

10 Owen v. I.C. System, Inc., 629 F.3d 1263 (11th Cir. 2011).

11 Reichert v. National Credit Systems, Inc., 531 F.3d 1002 (9th Cir. 2008).

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IV. Electronic Fund Transfer

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209, 297
West's Key Number Digest, Banks and Banking 188.5

A.L.R. Library

A.L.R. Index, Electronic Funds Transfer System
West's A.L.R. Digest, Antitrust and Trade Regulation 209, 297
West's A.L.R. Digest, Banks and Banking 188.5

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IV. Electronic Fund Transfer

A. In General

§ 193. Generally; purpose

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

A.L.R. Library

Validity, Construction, and Application of Electronic Fund Transfer Act (EFTA), and Regulations Promulgated Thereunder, 15 U.S.C.A. ss 1693 et seq., 46 A.L.R. Fed. 2d 473

Treatises and Practice Aids

As to an introduction to electronic fund transfer proceedings, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

The Electronic Fund Transfer Act[1] was enacted for the purpose of providing a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems, and its primary objective is the provision of individual consumer rights.[2]

The purposes of the Act are to be carried out by regulations prescribed by the Bureau of Consumer Financial Protection.[3] However, the Board of Governors of the Federal Reserve System has authority to prescribe rules to carry out the purposes of the Act with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both,[4] and to carry out the purposes of the statute providing for reasonable fees and rules for payment card transactions.[5] The Bureau[6] and the Board[7] have promulgated regulations pursuant to the statute. The Bureau must issue model clauses for optional use by financial institutions to facilitate compliance with the statutory disclosure requirements and to aid consumers in understanding the rights and responsibilities of participants in electronic fund transfers by utilizing readily understandable language.[8] Model disclosure clauses have been promulgated by the Bureau.[9]

If electronic fund transfer services are made available to consumers by a person other than a financial institution holding a consumer's account, the Bureau must by regulation assure that the disclosures, protections, responsibilities, and remedies created by the Act are made applicable to such persons and services.[10] The disclosures, protections, responsibilities, and remedies established under the Act, and any regulation prescribed or order issued by the Bureau in accordance with the Act do not apply to any electronic benefit transfer system established under state or local law or administered by a state or local government[11] except for an electronic funds transfer under an electronic benefit transfer system for a deposit directly into a consumer account held by the recipient of the benefit.[12] The Act also provides for fee disclosures at automated teller machines, including the type of notice, and a prohibition on fees not properly disclosed and explicitly assumed by the consumer.[13]

No provision of the Act may be construed as altering, limiting, or otherwise affecting the deference that a court affords to the Bureau in making determinations regarding the meaning or interpretation of any provision of the Act for which the Bureau has authority to prescribe regulations or to the Board in making determinations regarding the meaning or interpretation of the statute providing for reasonable fees and rules for payment card transactions.[14]

The Act defines the key terms used therein.[15]

Footnotes

1 15 U.S.C.A. §§ 1693 to 1693r.

2 15 U.S.C.A. § 1693(b).

3 15 U.S.C.A. § 1693b(a)(1).

4 15 U.S.C.A. § 1693b(a)(2)(A).

5 15 U.S.C.A. § 1693b(a)(2)(B).
As to reasonable fees and rules for payment card transactions, see § 200.

6 12 C.F.R. §§ 1005.4 et seq.

7 12 C.F.R. §§ 205.1 et seq., 235.1 et seq.

8 15 U.S.C.A. § 1693b(b).

9 12 C.F.R. Pt. 1005, App. A.
As to the relation of the Act to state laws and the exemption of state-regulated electronic fund transfers from the requirements of the Act, see § 266.

10 15 U.S.C.A. § 1693b(d)(1).

11 15 U.S.C.A. § 1693b(d)(2)(B).

12 15 U.S.C.A. § 1693b(d)(2)(C).

13 15 U.S.C.A. § 1693b(d)(3).

14 15 U.S.C.A. § 1693b(e).

15 15 U.S.C.A. § 1693a.

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§ 194. Disclosure of terms and conditions of transfers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

The terms and conditions of electronic fund transfers involving a consumer's account must be disclosed at the time the consumer contracts for an electronic fund-transfer service in accordance with the regulations.[1] Such disclosures must be in readily understandable language and must include, to the extent applicable:

• the consumer's liability for unauthorized electronic fund transfers[2]

• the telephone number and address of the person or office to be notified in the event the consumer believes that an unauthorized electronic fund transfer has been or may be effected[3]

• the type and nature of such transfers which the consumer may initiate[4]

• charges[5]

• the consumer's right to stop payment of a preauthorized transfer[6]

• the consumer's right to receive documentation of transfers[7]

• a summary of the error resolution provisions of the Act and the consumer's rights thereunder[8]

• the financial institution's liability to the consumer[9]

• under what circumstances the financial institution will in the ordinary course of business disclose information concerning the consumer's account to third persons[10]

• notice to the consumer concerning certain ATM fees[11]

Provision is made for notification of a consumer of changes in any of such terms or conditions.[12]

Each remittance transfer provider must make disclosures as required by statute and in accordance with rules prescribed by the Bureau. Such disclosures are in addition to any other disclosures applicable under the Electronic Fund Transfer Act.[13] Subject to rules prescribed by the Bureau, a remittance transfer provider must provide, in writing and in a form that the sender may keep, to each sender requesting a remittance transfer, as applicable to the transaction, certain specified disclosures.[14]

Footnotes

1 15 U.S.C.A. § 1693c(a).
As to regulations dealing with initial disclosure of terms and conditions, see 12 C.F.R. §§ 205.7, 1005.7.
As to the definition of the term "account," see 15 U.S.C.A. § 1693a(2).

2 15 U.S.C.A. § 1693c(a)(1).
As to consumer liability, see § 202.

3 15 U.S.C.A. § 1693c(a)(2).

4 15 U.S.C.A. § 1693c(a)(3).

5 15 U.S.C.A. § 1693c(a)(4).

6 15 U.S.C.A. § 1693c(a)(5).
As to preauthorized electronic fund transfers, see § 195.

7 15 U.S.C.A. § 1693c(a)(6).
As to documentation of transfers, see § 195.

8 15 U.S.C.A. § 1693c(a)(7).
As to error resolution, see § 196.

9 15 U.S.C.A. § 1693c(a)(8).
As to the liability to the consumer of financial institutions, see § 203.

10 15 U.S.C.A. § 1693c(a)(9).

11 15 U.S.C.A. § 1693c(a)(10).

12 15 U.S.C.A. § 1693c(b).

13 15 U.S.C.A. § 1693*o*-1(a)(1).
Remittance transfer and remittance transfer provider are defined by statute. 15 U.S.C.A. § 1693*o*-1(g)(2), (3).

14 15 U.S.C.A. § 1693*o*-1(a)(2).
As to regulations for disclosures for remittance transfers, see 12 C.F.R. § 1005.31.

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IV. Electronic Fund Transfer

A. In General

§ 195. Transfers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

A financial institution holding a consumer's account, for each electronic fund transfer initiated by the consumer from an electronic terminal, must make available to the consumer written documentation of such transfer. Such documentation must clearly set forth the information prescribed by the statute.[1]

Where a consumer's account is scheduled to be credited by a preauthorized electronic fund transfer from the same payor at least once in each successive 60-day period, the financial institution is to elect to provide promptly either positive notice to the consumer when the credit is made as scheduled or negative notice when the credit is not made as scheduled.[2]

For each consumer account that may be accessed by means of an electronic fund transfer, the financial institution must provide the consumer with a periodic statement, which statement must be provided at least monthly for each monthly or shorter cycle in which a transfer has occurred or every three months, whichever is more frequent. The statement must include certain information as prescribed in the statute.[3] Procedures are established for providing written information to the consumer as to transfers involving a consumer's passbook account which may not be accessed by electronic fund transfers other than preauthorized transfers crediting the account[4] and for periodic statements involving a consumer's account, other than a passbook account, which may not be so accessed other than by preauthorized electronic fund transfers crediting the account.[5]

Practice Tip:

In an action involving a consumer, any documentation required by statute[6] to be given to the consumer which indicates that an electronic transfer was made to another person is admissible as evidence of such transfer and constitutes prima facie proof that the transfer was made.[7]

A preauthorized, electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and a copy thereof must be provided the consumer when made. A consumer may stop payment of such a transfer by giving notice to the financial institution as prescribed.[8] Where preauthorized transfers to the same person may vary in amount, the financial institution or designated payee must, prior to each transfer, provide reasonable advance notice to the consumer as to the amount to be transferred and the scheduled date thereof.[9] Preauthorized transfers are the subject of regulation.[10]

Provision is made for the suspension of obligations where a system malfunction prevents the effectuation of an electronic fund transfer.[11]

Footnotes

1 15 U.S.C.A. § 1693d(a).
As to definition of "electronic terminal," see 15 U.S.C.A. § 1693a(8).

2 15 U.S.C.A. § 1693d(b).
As to disclosure, see § 194.

3 15 U.S.C.A. § 1693d(c).

4 15 U.S.C.A. § 1693d(d).

5 15 U.S.C.A. § 1693d(e).

6 15 U.S.C.A. § 1693d.

7 15 U.S.C.A. § 1693d(f).

8 15 U.S.C.A. § 1693e(a).

9 15 U.S.C.A. § 1693e(b).

10 12 C.F.R. §§ 205.10, 1005.10.

11 15 U.S.C.A. § 1693j.

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§ 196. Resolution of errors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

Trial Strategy

Identity Theft and Other Misuses of Credit and Debit Cards, 81 Am. Jur. Proof of Facts 3d 113

The Electronic Fund Transfer Act provides a method for the resolution of errors in an electronic fund transfer.[1] If a financial institution, within 60 days after having transmitted to a consumer the documentation or notification as to transfers as statutorily required,[2] receives oral or written notice in which the consumer sets forth specified information, the institution must investigate the alleged error, determine whether an error has occurred, and report or mail the results of the investigation and its determination to the consumer within 10 business days.[3] If the institution determines that an error did occur, it must promptly, but in no event more than one business day after the determination, correct the error.[4] However, in lieu of the above-stated requirements, the institution upon receiving notice of error may, within 10 business days after receiving such notice, provisionally recredit the consumer's account for the amount alleged to be in error, including interest where applicable, pending the conclusion of its investigation and its determination of whether an error has occurred, and such investigation must be concluded not later than 45 days after receipt of such notice.[5] Where the institution determines after investigation that an error did not occur, it must deliver or mail to the consumer an explanation of its findings within three business days after the conclusion of its investigation.[6]

Provision is also made for resolution and investigating errors in remittance transfers.[7]

Footnotes

1 15 U.S.C.A. § 1693f.
As to the acts constituting an "error," see 15 U.S.C.A. § 1693f(f).

2 § 195.

3 15 U.S.C.A. § 1693f(a).

4 15 U.S.C.A. § 1693f(b).

5 15 U.S.C.A. § 1693f(c).

6 15 U.S.C.A. § 1693f(d).

7 15 U.S.C.A. § 1693*o*-1(d).

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A. In General

§ 197. Means of access to consumer's account

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

The Electronic Fund Transfer Act prohibits any person from issuing to a consumer any card, code, or other means of access to the consumer's account for the purpose of initiating an electronic fund transfer other than in response to a request or application therefor,[1] or as a renewal of, or in substitution for, an accepted card, code, or other means of access.[2] Notwithstanding the foregoing provision, an unsolicited card, code, or other means of access may be distributed if:[3]

(1) the card, code, or other means of access is not validated;

(2) the distribution thereof is accompanied by a complete disclosure;

(3) such distribution is accompanied by a clear explanation that the card, code, or other means of access is not validated and how the consumer may dispose of it or other means of access if validation is not desired; or

(4) the card, code, or other means of access is validated only in response to a request or application upon verification of the consumer's identity.

Footnotes

1 15 U.S.C.A. § 1693i(a)(1).

2 15 U.S.C.A. § 1693i(a)(2).

3 15 U.S.C.A. § 1693i(b).

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A. In General

§ 198. Compulsory use; waiver of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209, 297
West's Key Number Digest, Banks and Banking 188.5

The Electronic Fund Transfer Act prohibits any person from conditioning the extension of credit to a consumer on the consumer's repayment by means of preauthorized electronic fund transfers.[1] No person may require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of employment or receipt of a government benefit.[2]

A writing or other agreement between a consumer and any other person may not contain any provision which constitutes a waiver of any right conferred or cause of action created by the Electronic Fund Transfer Act. However, this provision does not prohibit any writing or other agreement which grants to a consumer a more extensive right or remedy or greater protection than contained in the Act or a waiver given in settlement of a dispute or action.[3]

Footnotes

1 15 U.S.C.A. § 1693k(1).
As to preauthorized transfers, see § 195.

2 15 U.S.C.A. § 1693k(2).

3 15 U.S.C.A. § 1693*l*.

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A. In General

§ 199. General-use prepaid cards, gift certificates, and store gift cards

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

It is generally unlawful for any person to impose a dormancy fee, an inactivity charge or fee, or a service fee with respect to a gift certificate, store gift card, or general-use prepaid card.[1] However, a dormancy fee, inactivity charge or fee, or service fee may be charged with respect to a gift certificate, store gift card, or general-use prepaid card if there has been no activity with respect to the certificate or card in the 12-month period ending on the date on which the charge or fee is imposed; the statutory disclosure requirements have been met; not more than one fee may be charged in any given month; and any additional requirements that the Bureau may establish through rulemaking have been met.[2] Also, the prohibition as to such fees does not apply to any gift certificate that is distributed pursuant to an award, loyalty, or promotional program, as defined by the Bureau, and with respect to which, there is no money or other value exchanged.[3]

It is also generally unlawful for any person to sell or issue a gift certificate, store gift card, or general-use prepaid card that is subject to an expiration date.[4] However, a gift certificate, store gift card, or general-use prepaid card may contain an expiration date if (1) the expiration date is not earlier than five years after the date on which the gift certificate was issued, or the date on which card funds were last loaded to a store gift card or general-use prepaid card; and (2) the terms of expiration are clearly and conspicuously stated.[5]

CUMULATIVE SUPPLEMENT

Cases:

Prepaid debit cards issued to released inmates representing inmates' funds relinquished upon entering jail were not marketed to the general public, and thus were not covered by Electronic Funds Transfer Act's (EFTA) prohibition against the imposition of service fees on general-use prepaid cards, even though released inmates who received debit cards became members of the public upon release; there was no record evidence suggesting that cards were ever directly or indirectly offered, advertised, or otherwise promoted to inmates, but rather inmates had no choice but to receive cards, and cards were marketed to correctional institutions, not the public. 15 U.S.C.A. § 1693*l*-1(a)(2)(D)(iv); 12 C.F.R. § 1005.20(b)(4). Humphrey v. Stored Value Cards, 355 F. Supp. 3d 638 (N.D. Ohio 2019).

[END OF SUPPLEMENT]

Footnotes

1 15 U.S.C.A. § 1693*l*-1(b)(1).
As to the definitions of general-use prepaid card, gift certificate, and store gift card, see 15 U.S.C.A. § 1693*l*-1(a)(2).

2 15 U.S.C.A. § 1693*l*-1(b)(2).
As to the required disclosures, see 15 U.S.C.A. § 1693*l*-1(b)(3).

3 15 U.S.C.A. § 1693*l*-1(b)(4).

4 15 U.S.C.A. § 1693*l*-1(c)(1).

5 15 U.S.C.A. § 1693*l*-1(c)(2).

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IV. Electronic Fund Transfer

A. In General

§ 200. Fees for payment card transactions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209
West's Key Number Digest, Banks and Banking 188.5

The Electronic Fund Transfer Act makes provision for reasonable interchange transaction fees for electronic debit transactions[1] as well as limitations on payment card network restrictions.[2] The statute prohibits exclusivity arrangements,[3] sets limits on restrictions on offering discounts for use of a form of payment,[4] and sets limits on restrictions on setting transaction minimums or maximums.[5]

Footnotes

1 15 U.S.C.A. § 1693*o*-2(a).
2 15 U.S.C.A. § 1693*o*-2(b).
3 15 U.S.C.A. § 1693*o*-2(b)(1).
4 15 U.S.C.A. § 1693*o*-2(b)(2).
5 15 U.S.C.A. § 1693*o*-2(b)(3).

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Tracy Bateman Farrell, J.D.; Amy G. Gore, J.D., of the staff of the National Legal Research Group, Inc.; Lonnie E. Griffith, Jr., J.D. and Karl Oakes, J.D.

Part One. Federal Legislation

IV. Electronic Fund Transfer

B. Enforcement and Liability

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Research References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209, 291, 304, 327, 400, 1013

A.L.R. Library

A.L.R. Index, Electronic Funds Transfer System

West's A.L.R. Digest, Antitrust and Trade Regulation 209, 291, 304, 327, 400, 1013

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17 Am. Jur. 2d Consumer Protection § 201

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§ 201. Administrative enforcement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 304, 327

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements of the Electronic Fund Transfer Act is to be administratively enforced under particular federal statutes by various federal agencies as prescribed by the Act.[1] For the purpose of the exercise of powers by some of such federal agencies, a violation of any requirement imposed under the Electronic Fund Transfer Act is deemed to be a violation of a requirement imposed by the federal statute under which the particular agency is empowered to act.[2]

Except to the extent that enforcement of the requirements imposed under the Electronic Fund Transfer Act is specifically committed to certain specified governmental agencies by the foregoing statutory provision, and subject to subtitle B of the Consumer Financial Protection Act of 2010, the Federal Trade Commission is required to enforce such requirements. A violation of any requirement imposed under the Act is deemed a violation of a requirement imposed under the Federal Trade Commission Act, and all the functions and powers of the Commission are available to it to enforce compliance with the Electronic Fund Transfer Act, irrespective of whether a person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.[3]

Footnotes

1 15 U.S.C.A. § 1693*o*(a).

2 15 U.S.C.A. § 1693*o*(b).

3 15 U.S.C.A. § 1693*o*(c).

As to the functions and powers of the Federal Trade Commission, see Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1168 to 1172.

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17 Am. Jur. 2d Consumer Protection § 202

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B. Enforcement and Liability

§ 202. Consumer liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 209, 400

The liability of a consumer for an unauthorized electronic fund transfer is limited by the Electronic Fund Transfer Act.[1] A consumer is liable for such an unauthorized transfer only if the card or other means of access utilized for such transfer was an accepted card or other means of access[2] and if the issuer thereof has provided a means whereby the user thereof can be identified as the person authorized to use it, such as by signature, photograph, or fingerprint or by electronic or mechanical confirmation.[3] In no event, however, does a consumer's liability exceed the lesser of $50[4] or the amount of money or value of property or services obtained in such unauthorized transfer prior to the time the financial institution is notified of, or otherwise becomes aware of, circumstances which lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be effected.[5] Notwithstanding the foregoing provision, reimbursement need not be made to the consumer for losses the financial institution establishes would not have occurred but for the failure of the consumer to report within 60 days of transmittal of the statement any unauthorized transfer or account error which appears on the periodic statement provided to the consumer[6] and for losses which the financial institution establishes would not have occurred but for the failure of the consumer to report any loss or theft of a card or other means of access within two business days after the consumer learns of the loss or theft. Nevertheless, the consumer's liability under the foregoing provision may not exceed a total of $500 or the amount of unauthorized transfers which occur following the close of two business days after the consumer learns of the loss or theft but prior to notice to the financial institution, whichever is less.[7]

Except as provided in the above provision of the Act, a consumer incurs no liability from an unauthorized electronic fund transfer.[8]

In an action involving a consumer's liability for an unauthorized transfer, the burden of proof is upon the financial institution to show that the transfer was authorized or, if the transfer was unauthorized, then to establish that the conditions of liability set forth in the Act have been met.[9]

Where a transaction involves both an unauthorized electronic fund transfer and an extension of credit pursuant to an agreement between the consumer and the financial institution to extend such credit in the event the consumer's account is overdrawn, the limitation on the consumer's liability for such transaction must be determined solely in accordance with the above statutory provisions.[10]

Nothing in the foregoing statutory provisions imposes liability upon a consumer for an unauthorized electronic fund transfer in excess of his or her liability for such a transfer under other applicable law or under any agreement with the financial institution.[11]

Footnotes

1 15 U.S.C.A. § 1693g.
As to the definition of "unauthorized electronic fund transfer," see 15 U.S.C.A. § 1693a(12).

2 As to the definition of "accepted card or other means of access," see 15 U.S.C.A. § 1693a(1).

3 15 U.S.C.A. § 1693g(a).

4 15 U.S.C.A. § 1693g(a)(1).

5 15 U.S.C.A. § 1693g(a)(2).

6 As to periodic statements, see § 195.

7 15 U.S.C.A. § 1693g(a).

8 15 U.S.C.A. § 1693g(e).

9 15 U.S.C.A. § 1693g(b).

10 15 U.S.C.A. § 1693g(c).

11 15 U.S.C.A. § 1693g(d).

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17 Am. Jur. 2d Consumer Protection § 203

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IV. Electronic Fund Transfer

B. Enforcement and Liability

§ 203. Financial-institution liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 291

Treatises and Practice Aids

As to civil action against financial institution, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

A financial institution is liable to a consumer for all damages proximately caused by its failure to make an electronic fund transfer, in accordance with the terms and conditions of an account, in the correct amount or in a timely manner when properly instructed to do so by the consumer except where:[1]

• the consumer's account has insufficient funds

• the funds are subject to legal process or other encumbrance restricting the transfer

• such transfer would exceed an established credit limit

• an electronic terminal has insufficient cash to complete the transaction

• as otherwise provided in regulations

A financial institution is liable for damages proximately caused to the consumer by its failure to make an electronic fund transfer due to insufficient funds when the financial institution failed to credit, in accordance with the terms and conditions of an account, a deposit of funds to the consumer's account which would have provided sufficient funds to make the transfer.[2] Additionally, an institution is liable for such damages for failure to stop payment of a preauthorized transfer from a consumer's account when instructed to do so in accordance with the terms and conditions of the account.[3] Where any failure by the institution above described was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error, the institution is liable for actual damages proved.[4]

A financial institution is not liable under the foregoing provisions if it shows by a preponderance of the evidence that its action or failure to act resulted from an act of God or other circumstance beyond its control, that it exercised reasonable care to prevent such an occurrence, and that it exercised such diligence as the circumstances required;[5] or a technical malfunction which was known to the consumer at the time he or she attempted to initiate an electronic fund transfer or, in the case of a preauthorized transfer, at the time such transfer should have occurred.[6]

There is no liability if an ATM operator posted notice in compliance with the statutory requirements and the notice is subsequently removed, damaged, or altered by any person other than the operator of the ATM.[7]

Footnotes

1 15 U.S.C.A. § 1693h(a)(1).

2 15 U.S.C.A. § 1693h(a)(2).

3 15 U.S.C.A. § 1693h(a)(3).

4 15 U.S.C.A. § 1693h(c).

5 15 U.S.C.A. § 1693h(b)(1).

6 15 U.S.C.A. § 1693h(b)(2).

7 15 U.S.C.A. § 1693h(d).
As to disclosure requirements for ATM machine operators, see § 193.

17 Am. Jur. 2d Consumer Protection § 204

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§ 204. Civil liability for noncompliance with Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 291

Treatises and Practice Aids

As to civil action against financial institution, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Forms

Forms relating to electronic fund transfer proceedings, see Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

The Electronic Fund Transfer Act provides that any person who fails to comply with any of the provisions thereof with respect to any consumer, except for error resolved by the statutory error resolution process,[1] is liable to the consumer for the actual damage sustained by the consumer as a result of such failure.[2] In addition, in the case of an individual action, the institution may be liable for an amount not less than $100 nor greater than $1,000.[3] Where the action is a class action, the institution is

liable for such amount as the court may allow, but as to each member of the class, no minimum recovery is applicable, and the total recovery in a class action or series of class actions arising out of the same failure to comply by the same person may not be more than the lesser of $500,000 or 1% of the net worth of the defendant.[4] Where the foregoing liability is successfully enforced by action, the court is to award the costs of the action, together with reasonable attorney's fees as determined by the court.[5] The relevant factors to be considered in determining the amount of liability, in addition to other relevant factors, are stated in the statute.[6] The error resolution statute[7] provides that a consumer is entitled to treble damages under the above provision authorizing actual damages if the court makes those findings set forth in the statute.[8]

Liability may not be imposed in an action asserting civil liability if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.[9] The statutory provisions imposing liability do not apply to acts done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau of Consumer Financial Protection or the Federal Reserve Board and certain officials or employees thereof or any failure to make disclosure in proper form if a financial institution utilizes an appropriate model clause issued by the Bureau or the Board, notwithstanding that thereafter such rule, and the like, or model clause, is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[10] No liability is to be imposed for any failure to comply with any requirement of the Act if, prior to the institution of an action to impose civil liability, the person notifies the consumer of the failure, complies with the requirements of the Act and makes an appropriate adjustment of the consumer's account and pays actual damages or, where applicable, damages for which a financial institution is liable.[11]

Where the court in an unsuccessful action under the statute finds that the action was brought in bad faith or for purposes of harassment, the court is to award to the defendant attorney's fees reasonable in relation to the work expended and costs.[12]

An action under the statute may be brought in any United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, but the action must be brought within one year from the date of the occurrence of the violation.[13]

Footnotes

1 § 196.
2 15 U.S.C.A. § 1693m(a)(1).
3 15 U.S.C.A. § 1693m(a)(2)(A).
4 15 U.S.C.A. § 1693m(a)(2)(B).
5 15 U.S.C.A. § 1693m(a)(3).
6 15 U.S.C.A. § 1693m(b).
7 As to error resolution, see § 196.
8 15 U.S.C.A. § 1693f(e).
9 15 U.S.C.A. § 1693m(c).
10 15 U.S.C.A. § 1693m(d).
11 15 U.S.C.A. § 1693m(e).
12 15 U.S.C.A. § 1693m(f).
13 15 U.S.C.A. § 1693m(g).

17 Am. Jur. 2d Consumer Protection § 205

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IV. Electronic Fund Transfer

B. Enforcement and Liability

§ 205. Criminal liability

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Antitrust and Trade Regulation 1013

A.L.R. Library

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971

The Electronic Fund Transfer Act provides for the imposition of a fine or imprisonment or both where a person knowingly and willfully gives false or inaccurate information or fails to provide information required to be disclosed by the Act or any regulation or otherwise fails to comply with any provision of the Act.[1] Penalties of a fine or imprisonment or both are imposed for described criminal conduct affecting interstate or foreign commerce and involving the use of counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instruments, such as a card, code, or other device, by the use of which a person may initiate an electronic fund transfer.[2]

Footnotes

1 15 U.S.C.A. § 1693n(a).

2 15 U.S.C.A. § 1693n(b), (c).

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17 Am. Jur. 2d Consumer Protection One V Refs.

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Part One. Federal Legislation

V. Extortionate Credit Transactions

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Extortion 25

A.L.R. Library

A.L.R. Index, Collections
A.L.R. Index, Consumer Protection
A.L.R. Index, Credit
A.L.R. Index, Extortion
West's A.L.R. Digest, Extortion 25

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V. Extortionate Credit Transactions

§ 206. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Extortion 25

A.L.R. Library

Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33

Treatises and Practice Aids

As to criminal prosecutions for extortionate credit transactions, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Action for Harassment of Debtor, 16 Am. Jur. Trials 619

Forms

Forms relating to extortionate transactions, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Title II of the Consumer Credit Protection Act[1] contains provisions prohibiting extortionate credit transactions.[2]

Observation:

These statutes are directed primarily at persons engaged in loan-sharking and organized crime but are not specifically limited to such situations.[3]

The Consumer Credit Protection Act defines the key terms used therein.[4]

Footnotes

1 Pub. L. No. 90-321, Title II, 82 Stat. 159.

2 18 U.S.C.A. §§ 891 to 894, 896.
As to the effect of the federal statutes on state laws, see § 267.

3 U.S. v. Wallace, 59 F.3d 333 (2d Cir. 1995).

4 18 U.S.C.A. § 891.

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17 Am. Jur. 2d Consumer Protection § 207

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V. Extortionate Credit Transactions

§ 207. Making extortionate extensions of credit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Extortion 25

A.L.R. Library

Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33

Treatises and Practice Aids

As to prima facie showing of extortionate extension of credit, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Forms

Forms relating to extortionate transactions, generally, see Am. Jur. Pleading and Practice Forms—Truth in Lending and Consumer Credit Protection; Federal Procedural Forms (L.Ed.)—Consumer Credit Protection [Westlaw® Search Query]

Whoever makes or conspires to make any extortionate extension of credit is subject to punishment by fine or imprisonment or both.[1] There is prima facie evidence that the extension of credit was extortionate if all the following factors were present in connection with the particular extension of credit:[2]

(1) the repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor in the jurisdiction within which the debtor, if a natural person, resided or in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business;

(2) the extension of credit was made at a rate of interest in excess of an annual rate of 45% calculated as specified;

(3) at the time the extension of credit was made, the debtor reasonably believed that either one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof; and

(4) upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

Evidence that the creditor used threats, even veiled ones, and that the debtor believed the creditor was connected to organized crime is admissible to show the debtor's belief that the lender would use, or had a reputation for using, extortionate means to collect extensions of credit for the purpose of prosecution for extortionate extension and collection of credit.[3] Where evidence has been introduced tending to show the existence of circumstances constituting the factor of unenforceability[4] or excess interest,[5] and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, the court in its discretion, for the purpose of showing the understanding of the debtor and creditor, may allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension of credit.[6]

Footnotes

1 18 U.S.C.A. § 892(a).
As to the definition of "extortionate extension of credit," see 18 U.S.C.A. § 891(6).

2 18 U.S.C.A. § 892(b).

3 U.S. v. Madori, 419 F.3d 159 (2d Cir. 2005).

4 18 U.S.C.A. § 892(b)(1).

5 18 U.S.C.A. § 892(b)(2).

6 18 U.S.C.A. § 892(c).

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V. Extortionate Credit Transactions

§ 208. Financing extortionate extensions of credit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Extortion 25

A.L.R. Library

Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33

Validity, construction, and application of Consumer Credit Protection Act provisions (18 USC secs. 891-896) prohibiting extortionate credit transactions, 7 A.L.R. Fed. 950 (sec. 3 superseded in part Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33)

Treatises and Practice Aids

As to criminal prosecutions for extortionate credit transactions, generally, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

The Consumer Credit Protection Act makes it a punishable offense to willfully advance money or property, whether as a gift, loan, investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds

to believe that it is the intention of that person to use the money or property so advanced, directly or indirectly, for the purpose of making extortionate extensions of credit. Violation of the statute is punishable by a fine or imprisonment or both.[1]

Footnotes

1 18 U.S.C.A. § 893.

17 Am. Jur. 2d Consumer Protection § 209

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V. Extortionate Credit Transactions

§ 209. Collection by extortionate means

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Extortion 25

A.L.R. Library

Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33

Validity, construction, and application of Consumer Credit Protection Act provisions (18 USC secs. 891-896) prohibiting extortionate credit transactions, 7 A.L.R. Fed. 950 (sec. 3 superseded in part Construction and application of Consumer Credit Protection Act provisions (18 U.S.C.A. secs. 891-894) prohibiting extortionate credit transactions, 106 A.L.R. Fed. 33)

Treatises and Practice Aids

As to showing of implicit threat, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means to collect or attempt to collect any extension of credit, or to punish any person for the nonrepayment thereof, is subject to punishment by fine or imprisonment or both.[1] This statute does not exceed Congress's authority under the Commerce Clause and is not unconstitutional

as applied to a defendant even though the defendant acts solely in an intrastate context and is not a member of organized crime or a loan shark in the traditional sense.[2]

Practice Tip:

It is irrelevant that debts are legitimate where the evidence is sufficient to establish that defendants used coercion to collect extensions of credit.[3]

The statute provides that in any prosecution thereunder, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected, or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.[4] In such prosecution, the court in its discretion and under prescribed circumstances may allow evidence tending to show the reputation of the defendant in the community of which the person against whom the alleged threat was made was a member.[5]

Caution:

The defense of extortion, available under statute,[6] which exists when the defendant uses unlawful means in pursuit of property to which the defendant has a lawful claim, is not available in a prosecution under the extortionate credit transaction provision[7] because there is no indication in the legislative history of a congressional intent to create such a defense.[8]

CUMULATIVE SUPPLEMENT

Cases:

Statute criminalizing the collection of extensions of credit by extortionate means has a broad reach and clearly bars the use of extortionate means to collect payment for more than traditional "loans." 18 U.S.C.A. § 894. U.S. v. Dzhanikyan, 808 F.3d 97 (1st Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 18 U.S.C.A. § 894(a).
As to the definition of "extortionate means," see 18 U.S.C.A. § 891(7).

2 U.S. v. Bruce, 405 F.3d 145 (3d Cir. 2005).

3 U.S. v. Lopez, 803 F.2d 969, 21 Fed. R. Evid. Serv. 1201 (9th Cir. 1986).

4 18 U.S.C.A. § 894(b).

5 18 U.S.C.A. § 894(c).

6 18 U.S.C.A. § 1951.

7 18 U.S.C.A. § 894.

8 U.S. v. Traitz, 871 F.2d 368, 27 Fed. R. Evid. Serv. 1311 (3d Cir. 1989).

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Part One. Federal Legislation

VI. Real Estate Settlement Procedures

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1, 64.1, 65

A.L.R. Library

A.L.R. Index, Consumer Protection
A.L.R. Index, Disclosure
A.L.R. Index, Escrow
A.L.R. Index, Mortgages
A.L.R. Index, Sale or Transfer of Property
West's A.L.R. Digest, Consumer Credit 30, 33.1, 64.1, 65

17 Am. Jur. 2d Consumer Protection § 210

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VI. Real Estate Settlement Procedures

§ 210. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1

A.L.R. Library

Construction and application of Real Estate Settlement Procedures Act of 1974 (12 U.S.C.A. secs. 2601), 142 A.L.R. Fed. 511

Treatises and Practice Aids

As to introduction to real estate settlement proceedings, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

Trial Strategy

Litigation Concerning Mortgage Foreclosures, 125 Am. Jur. Trials 541

The Real Estate Settlement Procedures Act (RESPA)[1] was enacted by Congress on findings that reforms in the real estate-settlement process were needed to insure that consumers are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by abusive practices.[2] The stated purpose of RESPA is to effect certain changes in the settlement process for residential real estate that will result in more effective advance disclosure to home buyers and sellers of settlement costs, in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services, in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance, and in significant reform and modernization of local recordkeeping of land title information.[3]

RESPA does not apply to credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes or to government or governmental agencies or instrumentalities.[4]

RESPA does not affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.[5]

The Bureau of Consumer Financial Protection is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of the Act.[6]

Regulations implementing RESPA have been issued by the Bureau of Consumer Financial Protection.[7]

The terms used in the Real Estate Settlement Procedures Act are defined in the statute.[8]

CUMULATIVE SUPPLEMENT

Cases:

Borrower stated that lenders and loan servicer violated RESPA by not conducting reasonable investigation into or correcting errors, and that lender committed negligence per se by mishandling her home mortgage after she temporarily fell into delinquency, on allegations that defendants wrongly allowed her home to be foreclosed on despite having signed loan-modification agreement with her, and acted inconsistently with loan-modification agreement before transferring mortgage to another lender which also violated that agreement, and lender continued to shower borrower with letters claiming she was in default and threatening another foreclosure, and when she repeatedly notified lender that those errors had occurred, it flatly denied any error. Real Estate Settlement Procedures Act of 1974, § 2, 12 U.S.C.A. § 2601; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; 12 C.F.R. § 1024.35. Nunez v. J.P. Morgan Chase Bank, N.A., 648 Fed. Appx. 905 (11th Cir. 2016).

In order to state a claim for failing to make a proper response to a qualified written request in violation of the Real Estate Settlement Procedures Act (RESPA), a plaintiff must allege that the failure to respond resulted in actual damages. Real Estate Settlement Procedures Act of 1974, § 6(e, f), 12 U.S.C.A. § 2605(e, f). Hopson v. Chase Home Finance LLC, 14 F. Supp. 3d 774 (S.D. Miss. 2014).

[END OF SUPPLEMENT]

Footnotes

1 12 U.S.C.A. §§ 2601 to 2610, 2614 to 2617.

2 12 U.S.C.A. § 2601(a).

3 12 U.S.C.A. § 2601(b).
As to the relation of the Act to state laws, see § 269.

4 12 U.S.C.A. § 2606(a).

5 12 U.S.C.A. § 2615.

6 12 U.S.C.A. § 2617(a).

7 12 C.F.R. §§ 1024.1 et seq.

8 12 U.S.C.A. § 2602.

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VI. Real Estate Settlement Procedures

§ 211. Uniform settlement statements; information booklets

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 30, 33.1

A.L.R. Library

Construction and effect of disclosure statutes requiring one extending credit or making loan to give statement showing terms as to amounts involved and charges made, 14 A.L.R.3d 330 (sec. 5 superseded in part by What constitutes "finance charge" under sec. 106(a) of the Truth in Lending Act (15 U.S.C.A. sec. 1605(a)) or applicable regulations, 46 A.L.R. Fed. 657 (superseded by What constitutes "finance charge" under sec. 106(a) of the Truth in Lending Act (15 U.S.C.A. sec. 1605(a)) or applicable regulations, 154 A.L.R. Fed. 431))

Construction and application of Real Estate Settlement Procedures Act of 1974 (12 U.S.C.A. secs. 2601), 142 A.L.R. Fed. 511

Treatises and Practice Aids

As to introduction to real estate settlement proceedings, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

The Bureau must publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the statutory disclosure requirements, in conjunction with the disclosure requirements of the Truth in

Lending Act that, taken together, may apply to a transaction that is subject to both or either provisions of law. Such forms are to conspicuously and clearly itemize all charges imposed upon the borrower and upon the seller in connection with the settlement and must indicate whether any title insurance premium included in the charges covers or insures the lender's interest in the property, the borrower's interest, or both.[1] The prescribed forms must be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement. However, the Bureau may make certain exceptions to this requirement, and the borrower may, in accordance with regulation, waive his or her right to have the forms made available to him or her at or before settlement.[2]

The Director of the Bureau of Consumer Financial Protection is required to prepare and distribute to lenders making federally related mortgage loans booklets to help borrowers understand the nature and costs of real estate settlement services.[3] Each booklet must be in such form and detail as the Director prescribes and, in addition to such other information as the Director may provide, must include in plain and understandable language a long list of specified information.[4] Lenders must provide this booklet to persons who prepare a written application to borrow money to finance the purchase of residential real estate[5] and, with the booklet, must include a good-faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement and a reasonably complete or updated list of homeownership counselors who are certified pursuant to statute and located in the area of the lender.[6]

There is no private cause of action for violations of RESPA sections requiring use of a uniform settlement statement[7] and the provision of home buying information booklets to borrowers.[8]

Footnotes

1 12 U.S.C.A. § 2603(a).
As to regulations pertaining to the uniform settlement statement form, see 12 C.F.R. §§ 1024.8 to 1024.10. For instructions for completing the uniform settlement statement and a form thereof, see 12 C.F.R. Pt. 1024, App. A.

2 12 U.S.C.A. § 2603(b).

3 12 U.S.C.A. § 2604(a).
As to regulations pertaining to the special information booklet, see 12 C.F.R. § 1024.6.

4 12 U.S.C.A. § 2604(b).

5 12 U.S.C.A. § 2604(d).

6 12 U.S.C.A. § 2604(c).
As to regulations pertaining to good-faith estimates of settlement services, see 12 C.F.R. § 1024.7.

7 Altman v. PNC Mortg., 850 F. Supp. 2d 1057 (E.D. Cal. 2012); Dalton v. Countrywide Home Loans, Inc., 828 F. Supp. 2d 1242 (D. Colo. 2011); Rodenhurst v. Bank of America, 773 F. Supp. 2d 886 (D. Haw. 2011); Morrison v. Brookstone Mortg. Co., Inc., 415 F. Supp. 2d 801 (S.D. Ohio 2005).

8 Dalton v. Countrywide Home Loans, Inc., 828 F. Supp. 2d 1242 (D. Colo. 2011); Rodenhurst v. Bank of America, 773 F. Supp. 2d 886 (D. Haw. 2011).

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§ 212. Prohibition against kickbacks and unearned fees

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1

A.L.R. Library

Failure of real-estate broker to disclose to principal fee-splitting agreement with adverse party, or adverse party's broker, as breach of fiduciary duty barring claim for commission, 63 A.L.R.3d 1211

Construction and application of Real Estate Settlement Procedures Act of 1974 (12 U.S.C.A. secs. 2601), 142 A.L.R. Fed. 511

The Real Estate Settlement Procedures Act prohibits the giving or accepting of any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan will be referred to any person.[1] Similar prohibition is made against accepting any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.[2] A settlement-service provider who gives a portion of a charge to another person who has not rendered any services in return would violate the statute prohibiting the splitting of fees for which no services were provided in return even if an express referral arrangement does not exist or cannot be shown.[3] The statute prohibiting the splitting of fees for which no services were provided in return does not reach the collection of unreasonably high fees by a settlement-service provider.[4] It cannot be read to prohibit charging fees, excessive or otherwise, when those fees are for services that were actually performed.[5] It unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee.[6]

The statute does not prohibit the payment of a fee to attorneys, a title company, or a lender for services actually rendered or performed.[7]

Violation of the statutory provisions is punishable by fine or imprisonment or both.[8] In addition, any person or persons who violate the prohibitions or limitations of this provision are jointly and severally liable to the person or persons charged for the settlement service involved in an amount equal to three times the amount paid for such settlement service.[9] RESPA's treble damages provision for fee splitting and kickback violations provides that a homebuyer is entitled to three times any charge paid for service connected to the kickback or fee-split, not just any resultant overcharge, and thus creates a private right of action even if the violation did not result in traditional monetary injury in the form of an overcharge of settlement services.[10]

CUMULATIVE SUPPLEMENT

Cases:

Provision of Real Estate Settlement Procedures Act prohibiting kickbacks in real estate settlement agreements allows captive reinsurance arrangements, in which a mortgage lender refers a borrower to a mortgage insurer that agrees to use a reinsurer affiliated with the mortgage lender, so long as the mortgage insurance companies pay no more than reasonable market value to the reinsurers for services actually provided. Real Estate Settlement Procedures Act of 1974 § 8, 12 U.S.C.A. §§ 2607(a), 2607(c). PHH Corporation v. Consumer Financial Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 12 U.S.C.A. § 2607(a).
As to regulations pertaining to the prohibition against kickbacks and unearned fees, see 12 C.F.R. § 1024.14.

2 12 U.S.C.A. § 2607(b).
The phrase "portion, split, or percentage," as used in this section, refers to a part of a whole. Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 182 L. Ed. 2d 955 (2012).

3 Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 182 L. Ed. 2d 955 (2012).

4 Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 182 L. Ed. 2d 955 (2012).

5 Martinez v. Wells Fargo Home Mortg., Inc., 598 F.3d 549 (9th Cir. 2010).

6 Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 182 L. Ed. 2d 955 (2012).

7 12 U.S.C.A. § 2607(c).

8 12 U.S.C.A. § 2607(d)(1).

9 12 U.S.C.A. § 2607(d)(2).

10 Alston v. Countrywide Financial Corp., 585 F.3d 753 (3d Cir. 2009).

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§ 213. Limitations on purchase of title insurance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1

A.L.R. Library

Construction and application of Real Estate Settlement Procedures Act of 1974 (12 U.S.C.A. secs. 2601), 142 A.L.R. Fed. 511

A seller of property that will be purchased with the assistance of a federally related mortgage loan is prohibited from requiring directly or indirectly, as a condition to selling the property, that title insurance be purchased by the buyer from any particular title company.[1]

A seller who violates the statute is liable to the buyer in an amount equal to three times all charges made for the title insurance.[2]

Footnotes

1 12 U.S.C.A. § 2608(a).

2 12 U.S.C.A. § 2608(b).

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§ 214. Limitations on escrow accounts

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West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1

Forms

Forms relating to drafting escrow agreements between two parties, see Am. Jur. Legal Forms 2d—Escrow [Westlaw® Search Query]

Limitations are placed upon the amount which a lender, in connection with a federally related mortgage loan, may require the borrower or prospective borrower to deposit in an escrow account established in connection with the loan for the purpose of assuring payment of taxes, insurance premiums, or other charges.[1] The limitation affects the aggregate sum[2] and monthly deposits[3] which may be required to be deposited in such an account. A loan servicer is required to notify a borrower of any shortage of funds in an escrow account[4] and provide borrowers with prescribed initial and annual statements concerning an escrow account.[5] In the case of each failure to submit a statement to a borrower as required, the Secretary must assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed for all such failures during any 12-month period may not exceed $100,000.[6] If any failure to submit a statement to a borrower is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure, the penalty is $100, with no limitation on the amount of such penalties.[7]

There is a split of authority on the question whether this provision creates a private right of action[8] as on the one hand it has been held that the statute does create a private cause of action, notwithstanding the absence of an express provision for such a cause of action, because the legislative history of the Act indicates that Congress intended to create a private remedy for violations of the Act.[9] On the other hand, it has been held that this provision of the Act creates no implied private right of action.[10]

Footnotes

1 12 U.S.C.A. § 2609.

2 12 U.S.C.A. § 2609(a)(1).

3 12 U.S.C.A. § 2609(a)(2).

4 12 U.S.C.A. § 2609(b).

5 12 U.S.C.A. § 2609(c).

6 12 U.S.C.A. § 2609(d)(1).

7 12 U.S.C.A. § 2609(d)(2).

8 Lake v. First Nationwide Bank, 156 F.R.D. 615 (E.D. Pa. 1994).

9 Vega v. First Federal Sav. & Loan Ass'n of Detroit, 622 F.2d 918 (6th Cir. 1980).

10 Allison v. Liberty Sav., 695 F.2d 1086 (7th Cir. 1982); Hardy v. Regions Mortg., Inc., 449 F.3d 1357 (11th Cir. 2006); Campbell v. Machias Sav. Bank, 865 F. Supp. 26 (D. Me. 1994); McAnaney v. Astoria Financial Corp., 357 F. Supp. 2d 578 (E.D. N.Y. 2005); Sarsfield v. Citimortgage, Inc., 667 F. Supp. 2d 461 (M.D. Pa. 2009).
The provision of RESPA limiting the amount of advance deposit in an escrow account that the lender may require in connection with a federally related mortgage loan does not imply a private right of action in favor of mortgagors. State of La. v. Litton Mortg. Co., 50 F.3d 1298, 32 Fed. R. Serv. 3d 519 (5th Cir. 1995).

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§ 215. Prohibition against fees for statements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1

A lender making a federally related mortgage loan is prohibited from imposing a fee or charge upon any other person, as a part of settlement costs or otherwise, for or on account of the preparation and submission by the lender of the uniform settlement statement[1] required by the Real Estate Settlement Procedures Act (RESPA).[2] Similar prohibition is made as to fees or charges for the preparation of a statement required by the Truth in Lending Act.[3]

RESPA permits a mortgage servicer to charge a fee for a payoff statement in response to a qualified written request on its website; the statutory prohibition against fees for certain statements fairly implies, absent evidence to the contrary, that the types of statements not enumerated are excluded from the prohibition.[4]

While one court held that RESPA creates a private cause of action for violations of the statute notwithstanding the absence of an express provision for such a cause of action, since the legislative history of the Act indicates that Congress intended to create a private remedy for violations of the Act,[5] there is authority to the contrary.[6]

Footnotes

1 § 211.

2 12 U.S.C.A. § 2610.

3 12 U.S.C.A. § 2610.
As to the Truth in Lending Act, see §§ 1 to 146.

4 Watt v. GMAC Mortg. Corp., 457 F.3d 781 (8th Cir. 2006).

As to qualified written requests, see § 216.

5 Vega v. First Federal Sav. & Loan Ass'n of Detroit, 622 F.2d 918 (6th Cir. 1980).

6 McKinney v. Fulton Bank, 776 F. Supp. 2d 97 (D. Md. 2010).

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§ 216. Servicing of mortgage loans

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 33.1

Each person who makes a federally related mortgage loan must disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.[1] Each servicer of any federally related mortgage loan must notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.[2] In addition, each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred must notify the borrower of any such assignment, sale, or transfer.[3] During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan, and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.[4]

If any servicer of a federally related mortgage loan receives a qualified written request (QWR) from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer must provide a written response acknowledging receipt of the correspondence within five days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.[5]

Definition:

A qualified written request must be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (1) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(2) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.[6] A letter is not a QWR under RESPA if it does not relate to the servicing of the account.[7]

CUMULATIVE SUPPLEMENT

Cases:

A contract is not formed between a borrower and a loan servicer simply by the loan servicer servicing a borrower's loans. Winebarger v. Pennsylvania Higher Education Assistance Agency, 411 F. Supp. 3d 1070 (C.D. Cal. 2019).

Mortgagor stated claim against loan servicer for violation of Real Estate Settlement Procedures Act (RESPA) regulation requiring loan servicers to treat facially complete loss mitigation applications as complete until mortgagor is given a reasonable opportunity to complete the application if additional information is needed, where she alleged that she provided everything that loan servicer requested in telephone calls with loan servicer's representatives but that loan servicer and its trustee nonetheless recorded a notice of default on her property without first completing loss mitigation procedures enumerated in the regulation. Real Estate Settlement Procedures Act of 1974, § 2 et seq., 12 U.S.C.A. § 2601 et seq.; 12 C.F.R. § 1024.41(c). Estrada v. Caliber Home Loans, Inc., 172 F. Supp. 3d 1108 (C.D. Cal. 2016).

Mortgage loan servicer's failure to respond to mortgagors' written requests for information about available loan modification programs, if proven, did not violate provision in Regulation X, implementing the Real Estate Settlement Procedures Act (RESPA), which required servicers to provide a reasonable response to a request for information, so long as information sought was not irrelevant; a different regulation governed provision of information to borrowers regarding loss mitigation options. Real Estate Settlement Procedures Act of 1974 § 2 et seq., 12 U.S.C.A. § 2601 et seq.; 12 C.F.R. §§ 1024.35(e), 1024.36, 1024.38(b)(2)(i). Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232 (D. Conn. 2017).

Home mortgagors' allegation that mortgage loan servicer, in response to qualified written request (QWR), provided inaccurate or incomplete information regarding who owned the loan and in stating that mortgagors had been offered proprietary trial loan modification as a loss mitigation option when in fact mortgagors had received only a forbearance agreement, stated a claim for violation of RESPA by failing to provide an explanation or clarification that included information requested by mortgagors or an explanation of why requested information was unavailable or could not be provided by servicer. Real Estate Settlement Procedures Act of 1974 § 6(e)(2)(C), 12 U.S.C.A. § 2605(e)(2)(C). Bennett v. Bank of America, N.A., 126 F. Supp. 3d 871 (E.D. Ky. 2015).

Home mortgagors were not required to plead damages with particularity, to state a claim in action alleging that mortgage loan servicers violated RESPA provision and implementing regulation under which a mortgage loan servicer is required to respond to a qualified written request (QWR) from the borrower or an agent of the borrower. Real Estate Settlement Procedures Act of 1974 § 6(e)(1)(A), 12 U.S.C.A. § 2605(e)(1)(A); 12 C.F.R. § 1024.36(a). Bennett v. Bank of America, N.A., 126 F. Supp. 3d 871 (E.D. Ky. 2015).

Allegations and requests for documents that relate to the validity of the loan and do not attack the servicing of the loan are not qualified written requests (QWRs) under RESPA. Real Estate Settlement Procedures Act of 1974 § 6, 12 U.S.C.A. § 2605(e). Best v. Federal National Mortgage Association, 450 F. Supp. 3d 606 (D. Md. 2020).

Borrower stated plausible claims against loan servicer for violations of RESPA and the requests for information provision of RESPA's implementing regulation, Regulation X, by alleging that, after servicer denied borrower's application for loss mitigation or loan modification on grounds that her gross monthly income was too low, and borrower sought clarification as to the factual basis for the denial, particularly as it related to the income determination, servicer did not respond in a substantive manner to, inter alia, her Request for Information, nor did it provide any explanation or documentation as to how it arrived at the income number that formed the basis of its denial but, instead, it merely advised borrower of its position that the Qualified Written Request (QWR) was not the way to challenge a loss mitigation denial, which borrower was not attempting to do. Real Estate Settlement Procedures Act of 1974, § 2 et seq., 12 U.S.C.A. § 2601 et seq.; 12 C.F.R. §§ 1024.36, 1024.36(a), 1024.36(d). In re Coppola, 596 B.R. 140 (Bankr. D. N.J. 2018).

Chapter 13 debtor's allegations that mortgagee and servicer failed to credit loan balance account with insurance proceeds after fire destroyed property and failed to issue a satisfaction of mortgage and satisfaction of judgment failed to state claim for conversion under New York law, absent allegations that debtor had an immediate superior right of possession in those proceeds, and that mortgagee or servicer exercised unauthorized dominion and control over them. In re Scott, 572 B.R. 492 (Bankr. S.D. N.Y. 2017).

Federal regulation prohibiting dual tracking, under which a lender actively pursues foreclosure while simultaneously considering the borrower for loss mitigation options, did not apply, where mortgagor's second loss mitigation application was denied based on her corrected income almost more than a year before the filing of a notice of default, and her third loss mitigation application, which was still open for review after the filing of notice of default, was never completed. 12 C.F.R. § 1024.41(g). Gordon v. U.S. Bank National Association, 455 P.3d 374 (Idaho 2019).

[END OF SUPPLEMENT]

Footnotes

1 12 U.S.C.A. § 2605(a).

2 12 U.S.C.A. § 2605(b).

3 12 U.S.C.A. § 2605(c)(1).

4 12 U.S.C.A. § 2605(d).

5 12 U.S.C.A. § 2605(e)(1)(A).

6 12 U.S.C.A. § 2605(e)(1)(B).

7 Medrano v. Flagstar Bank, FSB, 704 F.3d 661 (9th Cir. 2012), cert. denied, 133 S. Ct. 2800, 186 L. Ed. 2d 861 (2013); Henson v. Bank of America, 935 F. Supp. 2d 1128 (D. Colo. 2013).

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§ 217. Jurisdiction; limitations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Consumer Credit 64.1, 65

Treatises and Practice Aids

As to jurisdiction; removal for real estate settlement proceedings, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

As to limitation of actions for real estate settlement proceedings, see Federal Procedure, L. Ed.—Consumer Credit Protection [Westlaw®: Search Query]

An action to recover damages for violation of the provisions of the Real Estate Settlement Procedures Act regarding servicing of mortgage loans,[1] prohibiting kickbacks and unearned fees,[2] or prohibiting a seller from requiring that title insurance be purchased from a particular title company[3] may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred.[4] A violation of the provision regarding servicing of mortgage loans must be brought within three years while the others must be brought within one year from the date of the occurrence of the violation except that actions brought by the Bureau of Consumer Financial Protection, the Secretary of Housing and Urban Development, the attorney general of any state, or the insurance commissioner of any state may be brought within three years from the date of the occurrence of the violation.[5]

Footnotes

1 § 216.
2 § 212.
3 § 213.
4 12 U.S.C.A. § 2614.
5 12 U.S.C.A. § 2614.

End of Document